(2)

No. 91-1920

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

CLAUDE T. WEIMER, For Himself; and
ASSOCIATION OF COMMONWEALTH CLAIMANTS,
An Unincorporated Association,

Petitioners,

vs.

PAUL AMEN; COMMERCE SAVINGS COLUMBUS, INC.; FIRST SAVINGS CO.; FIRST NATIONAL BANK; NORWEST CORP.; COMMERCE GROUP, INC.; COMMERCE SAVINGS LINCOLN, INC.; PROVIDENT FEDERAL SAVINGS BANK; AMERICAN SAVINGS COMPANY; COMMERCE SAVINGS SCOTTSBLUFF, INC.; KEN WELLMAN; WILLIAM BECKMAN; DOUGLAS ALFORD; ALFRED ADAMS; KENLON H. HAKE; ROY ASHCRAFT; DARRELL ANDERSON; TIM SPOENENMAN; DENIS APPELBEE,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

JOINT BRIEF FOR RESPONDENTS

RODNEY M. CONFER
KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68502
(402) 475-7011

Counsel of Record
for the Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged RICO violations in administering a state-chartered deposit insurance corporation proximately caused losses to creditors of an insured bank which occurred when the bank failed.

2. Whether it was an abuse of discretion to dismiss an amended complaint for failure to state a claim without granting a post-dismissal request for leave to amend.

PARTIES TO THIS PROCEEDING

The petition does not include the list of the parties required by Supreme Court Rule 14.1(b).

Petitioner:

Association of Commonwealth Claimants (ACC).

Respondents:

Paul Amen.

First National Bank Grand Island[1]

First Savings Co. of Grand Island[2]

Norwest Corp.[3]

---

[1] Parent: Norwest Corp.
Subsidiary: First Savings Co. of Grand Island.

[2] Parent: First National Bank Grand Island; no subsidiary.

[3] No parent; subsidiaries: Chalfen Bankshares, Inc.; Norwest Holding Company (subsidiary Norwest Bank Minnesota, N.A. (subsidiaries: Centennial Investment Corporation; Norwest Business Credit, Inc.; Norwest Equipment Finance, Inc. (subsidiaries: Commonwealth Leasing Corporation; Radio Dealers Leasing, Inc.); Norwest Bank International, Colorado; Norwest Bank International, Iowa; Norwest Bank International, Wisconsin; Norwest Funding, Inc.; Norwest Trust Company, New York; Minneapolis Asset Management, Inc.; Norwest Bank International (subsidiary: Norwest Asia Limited); Flora Properties, Inc.)); The Bank Information Services, Inc.; Norwest Bank Minnesota Central, N.A.; Norwest Bank

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Minnesota Mesabi, N.A.; Norwest Bank Minnesota North, N.A.; Norwest Bank Minnesota South, N.A.; Norwest Bank Minnesota South Central, N.A.; Norwest Bank Minnesota Southeast, N.A.; Norwest Bank Minnesota Southwest, N.A.; Norwest Bank Minnesota West, N.A.; Norwest Bank Red Wing, N.A.; Norwest Bank Waseca, N.A.; Norwest Bank Arizona, N.A.; Norwest Colorado, Inc. (subsidiaries: Norwest Bank Academy Place, N.A.; Norwest Bank Arapahoe, N.A.; Norwest Bank Arvada, N.A.; Norwest Bank Aurora, N.A.; Norwest Bank Aurora-City Center, N.A.; Norwest Bank Aurora-South, N.A.; Norwest Bank Bear Valley, N.A.; Norwest Bank Boulder, N.A. (subsidiary: Pearl Properties, Inc.); Norwest Bank Brighton, N.A.; Norwest Bank Broomfield, N.A.; Norwest Bank Buckingham Square, N.A.; Norwest Bank Cherry Creek, N.A.; Norwest Bank Colorado Springs, N.A.; Norwest Bank Colorado Springs-East, N.A.; Norwest Bank Delta, N.A.; Norwest Bank Denver, N.A. (subsidiaries: United Asset Management Services, Inc.; Norwest Operations Services, Inc.; Freemont Properties, Inc.; Stoutco, Inc.; Lincoln Building Corporation; The Bankers Company; United Mortgage Company; UBD Capital, Inc.; United Delivery Systems, Inc.; Mountain States Bankcard Association; TW Properties, Inc.; Capital Community Development Corp.); Norwest Bank Durango, N.A.; Norwest Bank Fort Collins, N.A.; Norwest Bank Fort Collins-South, N.A.; Norwest Bank Garden of the Gods, N.A.; Norwest Bank Grand Junction, N.A.; Norwest Bank Grand Junction-Downtown, N.A.; Norwest Bank Greeley, N.A.; Norwest Bank Highlands Ranch, N.A.; Norwest Bank Lakewood, N.A.; Norwest Bank LaSalle, N.A.; Norwest Bank Littleton, N.A.; Norwest Bank Longmont, N.A.; Norwest Bank Monaco, N.A.; Norwest Bank Montrose, N.A.; Norwest Bank Northglenn, N.A.; Norwest Bank Pueblo, N.A.; Norwest Bank Southglenn, N.A.; Norwest Bank Southwest Plaza, N.A.; Norwest Bank Steamboat Springs, N.A.; Norwest Bank Sterling, N.A.; Norwest Bank Sunset Park, N.A.; United Bank of Ignacio National

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Association); First Illini Bancorp, Inc. (subsidiary: First Illini Bank); Norwest Bank Indiana, N.A. (subsidiaries: South Bend Asset Management, Inc.; National Autopark, Inc.; Nat-Lea, Inc.; Nabankco, Inc. (subsidiary: La Salle, Inc.)); Davenport Bank and Trust Company, N.A. (subsidiaries: Bettendorf Asset Management, Inc.; Davenport Blackhawk Civic Corp.; D.B. Food Service, Inc.; Davenport Bancorporation; NOW, Inc.; Tower Data Processing Corporation); Blackhawk Bancorporation (subsidiary: Blackhawk Leasing Corporation); P B Bancorp of Cedar Rapids, Inc. (subsidiary: Norwest Bank Iowa, N.A. (subsidiaries: Iowa Asset Management, Inc.; Des Moines Holding Company)); Norwest Bank Anaconda-Butte, N.A.; Norwest Bank Billings, N.A. (subsidiary: Buffarn, Inc.); Norwest Bank Dillon, N.A.; Norwest Bank Great Falls, N.A.; Norwest Bank Helena, N.A.; Norwest Bank Kalispell, N.A.; Norwest Bank Lewistown, N.A.; Norwest Bank Nebraska, N.A. (subsidiary: Sgnik, Incorporated); Norwest Bank Nebraska Lincoln, N.A.; Norwest Bank North Dakota, N.A.; Norwest Bank South Dakota, N.A. (subsidiary: South Dakota Asset Management, Inc.); Norwest Bank Wisconsin, N.A. (subsidiaries: Green Bay Asset Management, Inc.; First Interstate Insurance Agency of Wisconsin, Inc.); Norwest Bank Wisconsin Eau Claire, N.A. (subsidiary: Eau Claire Asset Management, Inc.); Norwest Bank Wisconsin Waupun (subsidiaries: Risk Consultants, Inc.; Waupun Asset Management, Inc.); Norwest Bank La Crosse, N.A. (subsidiary: La Crosse Asset Management, Inc.); Wyoming National Bancorporation (subsidiaries: Norwest Bank Wyoming Casper, N.A.; Norwest Bank Wyoming Cheyenne, N.A.; Norwest Bank Wyoming Gillette, N.A.; Norwest Bank Wyoming Lovell, N.A.; Norwest Bank Wyoming Wheatland, N.A. (subsidiary: Norwest Insurance Wyoming, Inc.); Wyoming National Corporation); Norwest Capital Management & Trust Co., Montana; American Land Title Co., Inc.; CI Real Estate Holding Corporation; Fidelity National Life Insurance

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Company; First Interstate Equipment Finance of Wisconsin, Inc.; IntraWest Insurance Company; Lincoln Agency, Inc./ Phoenix, Arizona; MIG Insurance Brokers, Inc.; Minnesota FSL Corporation; Minnetonka Overseas Investment Limited (subsidiary: Minnetonka Represent Commercials Ltd.); Northern Prairie Indemnity Limited (subsidiary: Superior Guaranty Insurance Company); Nortico Investments Limited; Norwest Agricultural Credit, Inc.; Norwest Alliance System, Inc.; Norwest Audit Services, Inc.; Norwest Capital Markets, Inc.; Norwest Credit, Inc.; Norwest Financial Services, Inc. (subsidiaries: Dial National Bank; Norwest Financial Credit Services, Inc.; Norwest Financial, Inc. (subsidiaries: Agency Technologies Data Services, Inc. of Florence; Centurion Agency Ohio, Inc.; Centurion Agencies Co.; Centurion Finance Company; Centurion Life Insurance Company); Dial Bank (subsidiaries: CHM Insurance Company; Centurion Casualty Company); Dial Finance Company, Inc.; Dial Finance Company, Incorporated; Dial Finance Company of Hawaii, Inc.; Dial Finance Company of Michigan No. 1; Dial Finance Company of Ohio No. 1, Inc.; Merger Company, Inc.; Dial Finance Company of Oklahoma; Dial Finance Company of Oregon; Dial Finance Company of Washington; Ellis Advertising, Inc.; Faxual Credit Reporting Service Inc.; IFCO Corporation; IFCO North Carolina, Inc.; IFCO Virginia, Inc.; Mail Systems Co.; Mercury Marine Finance, Inc.; Norwest Credit Services New York, Inc.; Norwest Financial Acceptance, Inc. (formerly XL Credit Plan, Inc.); Norwest Financial Alabama, Inc.; Norwest Financial Alaska, Inc.; Norwest Financial America, Inc.; Norwest Financial Arizona, Inc.; Norwest Financial Burnsville, Inc.; Norwest Financial Business Credit, Inc.; Norwest Financial California, Inc.; Norwest Financial Coast, Inc.; Norwest Financial Colorado, Inc.; Norwest Financial Connecticut, Inc.; Norwest Financial Consumer Discount Company; Norwest Financial Delaware, Inc.; Norwest Financial Escrow System

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

California, Inc.; Norwest Financial Florida, Inc. (subsidiary: Norwest Financial System Florida, Inc.); Norwest Financial Fridley, Inc.; Norwest Financial Georgia, Inc.; Norwest Financial Golden Valley, Inc.; Norwest Financial Hawaii, Inc.; Norwest Financial Idaho, Inc.; Norwest Financial Illinois, Inc.; Norwest Financial Indiana, Inc.; Norwest Financial Industrial Loan Company; Norwest Financial Industrial West Virginia, Inc.; Norwest Financial Information Services Group, Inc.; Norwest Financial Inver Grove Heights, Inc.; Norwest Financial Iowa 1, Inc.; Norwest Financial Iowa 2, Inc.; Norwest Financial Iowa 3, Inc.; Norwest Financial Kansas, Inc.; Norwest Financial Kentucky, Inc.; Norwest Financial Kentucky 1, Inc.; Norwest Financial Leasing, Inc.; Norwest Financial Louisiana, Inc.; Norwest Financial Maine, Inc.; Norwest Financial Maplewood, Inc.; Norwest Financial Maryland, Inc.; Norwest Financial Maryland 1, Inc.; Norwest Financial Massachusetts; Norwest Financial Massachusetts 1; Norwest Financial Massachusetts 1, Inc.; Norwest Financial Massachusetts, Inc.; Norwest Financial Minnesota, Inc.; Norwest Financial Mississippi, Inc.; Norwest Financial Missouri, Inc.; Norwest Financial Missouri 1, Inc.; Norwest Financial Montana, Inc.; Norwest Financial Nebraska, Inc.; Norwest Financial Nevada, Inc.; Norwest Financial Nevada 1, Inc.; Norwest Financial Nevada 2, Inc.; Norwest Financial New Hampshire, Inc.; Norwest Financial New Hampshire 1, Inc.; Norwest Financial New Jersey, Inc.; Norwest Financial New Mexico, Inc.; Norwest Financial New Mexico 1, Inc.; Norwest Financial New York, Inc.; Norwest Financial North Carolina, Inc.; Norwest Financial North Carolina 1, Inc.; Norwest Financial North Dakota, Inc.; Norwest Financial Ohio, Inc.; Norwest Financial Ohio 1, Inc.; Norwest Financial Oklahoma, Inc.; Norwest Financial Resources, Inc.; Norwest Financial Rhode Island, Inc.; Norwest Financial Rochester, Inc.; Norwest Financial Roseville, Inc.; Norwest Financial South Carolina, Inc.; Norwest Financial South Dakota, Inc.; Norwest

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

(Continued from previous page)

Financial System Minnesota, Inc.; Norwest Financial System Oregon, Inc.; Norwest Financial System Virginia, Inc.; Norwest Financial Tennessee, Inc.; Norwest Financial Texas, Inc.; Norwest Financial Utah, Inc.; Norwest Financial Virginia, Inc.; Norwest Financial Washington, Inc.; Norwest Financial West Virginia, Inc.; Norwest Financial Wisconsin, Inc.; Norwest Financial Wyoming, Inc.; Prime Rate Premium Finance Corporation; Prime Rate Premium Finance Corporation North Carolina; Prime Rate Premium Finance Corporation Virginia); Norwest Insurance, Inc. (subsidiaries: ATI Holding Company; Crop Hail Management; Crop Risk Management, Inc.; Norwest Agencies Montana, Inc.; Abramson-Naut-Kraeger-Oas Agency, Inc.; Warranty Title, Inc.; Regency Insurance Agency, Inc.; Rural Community Insurance, Inc.; Servcorp of Yankton, Inc.); Norwest Investment Advisors, Inc.; Norwest Investment Management, Inc.; Norwest Investment Services, Inc.; Norwest Investors, Inc. (subsidiary: Norwest V.C. partners); Norwest Limited, Inc. (subsidiaries: Norwest Equity Capital, Inc.; Norwest Growth Fund, Inc. (SBIC); Norwest Venture Capital Management, Inc.); Norwest Mortgage, Inc (fka Norwest Funding, Inc.) (subsidiaries: ATI Holding Company; Keller Corp.; Norwest Mortgage Asset Management Corp.; Norwest Mortgage Insured 1, Inc.; Norwest Mortgage Insured 2, Inc.; Norwest Mortgage Conventional 1, Inc.; Norwest Mortgage Closing Services, Inc.; Norwest Mortgage of New York, Inc.); Norwest Nova, Inc.; Norwest Overseas Finance Corp.; Norwest Properties, Inc. (subsidiaries: Norwest Bank Building Company; Norwest Properties Holding Company (subsidiary: Norwest Center, Inc.)); Norwest Retail Services, Inc.; Norwest Technical Service, Inc. (formerly Norwest information Services, Inc.); P N, Inc.; Peoples Mortgage and Investment Company; Peregrine Capital Management, Inc.; Spectrum Properties, Inc. (subsidiaries: FDMC, Inc.; Teller Properties, Inc.); United Banks Financial Services Corporation; United Banks Insurance Services,

(Continued on following page)

PARTIES TO THIS PROCEEDING – Continued

Commerce Group, Inc. (succeeded by First Commerce Bancshares, Inc.)[4]

Commerce Savings Columbus, Inc.[5]

Commerce Savings Scottsbluff, Inc.[6]

Commerce Savings Lincoln, Inc. (succeeded by First Commerce Savings, Inc.)[7]

(Continued from previous page)

Inc.; United Equity Corporation; Wayzata Mortgage Company; Citizens Bancorporation, Inc.; Norwest, Inc.; Norwest, Inc.; Norwest, Inc.; Norwest Financial Corporation; United Colorado Banks, Inc.; United Financial Centers, Inc.; United Industrial Banks Corporation; United Trust Company.

[4] No parent; subsidiaries: Commerce Savings Columbus, Inc.; Commerce Savings Scottsbluff, Inc.; First Commerce Savings, Inc.; Commerce Affiliated Life Insurance, Inc.; First Commerce Investors, Inc.; First National Bank of Kearney, Nebraska; City National Bank of Hastings, Nebraska; First National Bank of West Point, Nebraska; Overland National Bank of Grand Island, Nebraska; North Platte National Bank of North Platte, Nebraska; First National Bank of McCook, Nebraska; and National Bank of Commerce Lincoln, Nebraska. National Bank of Commerce Lincoln has these subsidiaries: Peterson Building Corp.; Robert E. Schweser Co.; Commerce Court, Inc.; NBC Computer Services, Inc.; and First Commerce Mortgage Co.

[5] Parent: First Commerce Bancshares, Inc.; no subsidiaries.

[6] Parent: First Commerce Bancshares, Inc.; no subsidiaries.

[7] Parent: First Commerce Bancshares, Inc.; subsidiary: First Commerce Farm and Ranch Management, Inc.

PARTIES TO THIS PROCEEDING – Continued

Provident Federal Savings Bank.[8]

American Savings Co. (succeeded by First American Savings Bank fsb)[9]

Ken Wellman.

William Beckman.

Douglas Alford.

Alfred Adams.

Kenlon H. Hake.

Roy Ashcraft.

Darrell Anderson.

Tim Spoeneman.

Denis Appelbee.

Other parties:

S. E. Copple.[10]

Marvin Copple.[11]

---

[8] No parent; no subsidiary.

[9] Parent: A.N.F. Financial Services, Inc.; subsidiary: American Investment, Inc.

[10] Mr. Copple never participated in this suit, and is now deceased. His estate is not represented in these proceedings, and it is not one of the respondents filing this joint brief.

[11] Marvin Copple is not one of the respondents submitting this joint brief. His counsel has indicated he will not file a response to the petition for writ of certiorari.

PARTIES TO THIS PROCEEDING – Continued

Union Bank & Trust Co.[12]

State Security Savings.[13]

Federal Deposit Insurance Corp.[14]

---

[12] This party is not one of the respondents filing this joint brief. It has never been served with process and its counsel has indicated he will not file a response to the petition for writ of certiorari. Respondents are not aware of the parents or subsidiaries of Union Bank.

[13] Although this party was originally a defendant and its counsel was served with a copy of the petition for writ of certiorari, it is not named in the last version of the ACC's complaint. It has gone through bankruptcy proceedings and its counsel has indicated he will not file a response to the petition. Respondents are not aware of its parents or subsidiaries.

[14] The FDIC is named in the caption of the petition for writ of certiorari, but not in the latest version of ACC's complaint, and counsel for the FDIC was apparently not served with the petition. The FDIC is not one of the respondents filing this joint brief.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THIS PROCEEDING ii

TABLE OF CONTENTS xi

TABLE OF AUTHORITIES xii

STATUTES WHICH THIS CASE INVOLVES 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. Review of the ACC's standing claim is unnecessary 10

II. There was no abuse of discretion in not allowing further leave to amend before dismissing ACC's amended complaint 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES:

Burks v. Lasker, 441 U.S. 471, 99 S.Ct. 1831 (1979) 18

Foman v. Davis, 371 U.S. 178 (1962) 21

Holmes v. SIPC, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)..... *passim*

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)..... 6

Haman v. Marsh, 237 Neb. 699, 467 N.W.2d 836 (1991)..... 17

In re Sunrise Securities Litigation, 108 B.R. 471 (E.D.Pa. 1989), *aff'd*, 916 F.2d 874 (3d Cir. 1990) 7, 8, 9, 18, 19

Kamen v. Kemper Financial Services, Inc., ___ U.S. ___, 111 S.Ct. 1711 (1991)..... 18

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)..... 14

State v. Copple, 224 Neb. 672, 401 N.W.2d 141 (1987)..... 15

Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990)..... *passim*

Weimer v. Amen, 870 F.2d 1400 (8th Cir. 1989)..... 15

Zenith Radio v. Hazeltine Research, Inc., 401 U.S. 321 (1971).....20, 21

STATUTES AND OTHER AUTHORITIES:

Supreme Court Rule 10.1(a)..... 20

18 U.S.C. § 1964(c) 1

TABLE OF AUTHORITIES – Continued

Page

Neb. Rev. Stat. § 8-199 (1987).....1, 16

Nebraska Depository Institution Guaranty Corporation Act, *Neb. Rev. Stat.* §§ 21-17,127 *et seq.* (1987).....3

Neb. Rev. Stat. § 21-17,132 (1987).....3

Neb. Rev. Stat. § 21-17,133 (1987).....4

Neb. Rev. Stat. § 21-17,135 (1987).....4

Neb. Rev. Stat. § 21-17,136 (1987).....3

Neb. Rev. Stat. § 21-17,144 (1987).....4

Neb. Rev. Stat. § 21-17,145 (1987).....3

STATUTES WHICH THIS CASE INVOLVES

18 U.S.C. § 1964(c):

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Neb. Rev. Stat. § 8-199 (1987):

> "Whenever the department has been designated receiver for an institution subject to its jurisdiction, the department shall have all the powers and privileges provided by the laws of this state with respect to any other receiver and such incidental powers as shall be necessary to carry out an orderly and efficient liquidation or reorganization of any financial institution for which the department may have become receiver, either by operation of law or by judicial appointment. Acting by and through the director, the department may in its own name as such receiver enforce on behalf of such institution or its creditors or shareholders, by actions at law or in equity, all debts or other obligations of whatever kind or nature due to such institution or the creditors or shareholders thereof. In like manner, the department may make, execute, and deliver any and all deeds, assignments, and other instruments necessary and proper to effectuate any sale of real or personal property, or the settlement of any obligations belonging or due to such financial institution for which the department may have become receiver, or its creditors or shareholders, when such sale or

> settlement is approved by the district court of the county in which such institution is located. The director shall receive no fees, salary, or other compensation for his or her services in connection with the liquidation or reorganization of such institutions other than his or her salary."

STATEMENT OF THE CASE

Plaintiff and its assignors' injuries.

Some of the facts in Petitioner's statement of the case are not in the record. The record does not support the statement that there were 7,000 depositors or the number of claimants who were assignors of ACC. More importantly the amended complaint contradicts petitioner's statement that its assignors were all depositors; ACC's assignors are a collection of different types of creditors of Commonwealth Savings Company (Commonwealth).[15] All of ACC's assignors sustained injury, however, when Commonwealth was declared insolvent and was unable to repay them. Petitioner's Appendix S-24, ¶9.

---

[15] The amended complaint suggests that ACC is the assignee of an unspecified number of "owners of passbook savings accounts, certificates of indebtedness, money market accounts, individual retirement accounts, pension and welfare funds, trust accounts, promissory notes, capital notes and uncollected checks" of Commonwealth, as well as "general creditors," and personal representatives of such persons. Petitioners Appendix S-2, ¶3; *see also, id.* at S-20, ¶8F.

Commonwealth is in receivership.

Upon declaration of Commonwealth's insolvency, the Nebraska Department of Banking was appointed its receiver by, and under the supervision of, the District Court of Lancaster County, Nebraska. Petitioner's Appendix S-22, ¶J.

The Nebraska Depository Institution Guaranty Corporation.

Commonwealth's accounts were insured by the Nebraska Depository Institution Guaranty Corporation (NDIGC), a private corporation created by the Nebraska legislature to insure deposits of institutions which became members of NDIGC.[16] Petitioner's Appendix S-5 – S-6. The NDIGC was supervised by the Nebraska Department of Banking and Finance.[17] When Commonwealth and two other NDIGC member institutions failed in 1983 and 1984, the assets of NDIGC were insufficient to fully pay the insured amounts to Commonwealth's and the other institutions' creditors. Petitioner's Appendix S-6, S-9.

The defendants.

The amended complaint asserts claims against Mr. Amen, former Director of the Nebraska Department of Banking, and the former directors of the NDIGC, including S. E. Copple and Marvin Copple, two officers of

---

[16] *See generally*, the Nebraska Depository Institution Guaranty Corporation Act, *Neb. Rev. Stat.* §§ 21-17,127 *et seq.*

[17] *Neb. Rev. Stat.* §§ 21-17,132; 21-17,136; 21-17,145 (1987).

Commonwealth.[18] Petitioner's Appendix S-2, S-4. Under the Nebraska statutes, all directors of the NDIGC were required to be employees of depository institutions,[19] and the ACC sued all institutions whose employees were directors, except that Commonwealth was not sued. Petitioner's Appendix S-4.

Plaintiff's theories of recovery under RICO.

The ACC's amended petition alleges that between 1979 and 1983 the defendant NDIGC board members, with the Banking Director's concurrence, set guarantees at levels which the NDIGC would not be able to cover in the event of a member's insolvency, and required member institutions to advertise to the public that their accounts were insured up to these amounts (Petitioner's Appendix S-5 – S-6 and S-8 – S-9)[20]; that Amen failed to publicly declare Commonwealth and other institutions insolvent, and the defendants allowed these institutions to become members of the NDIGC (Petitioner's Appendix S-6 – S-8); that defendants weakened NDIGC's financial position by loans and "transfers" of NDIGC funds to depository institutions to prevent their failures (Petitioner's Appendix S-10 – S-16)[21]; that Mr. Amen and S.E.

---

[18] Neither of the Copples have participated in this case, and they are not among the respondents who have joined in this response.

[19] *Neb. Rev. Stat.* § 21-17,133 (1987).

[20] This advertisement was required by *Neb. Rev. Stat.* § 21-17,144 (1987).

[21] This is contemplated by *Neb. Rev. Stat.* § 21-17,135 (1987).

Copple conspired to prevent discovery of their and others' alleged criminal acts (Petitioner's Appendix S-14 – S-16); and that defendants failed to report one member's insolvency to an institution which acquired it (Petitioner's Appendix S-16 – S-17). ACC alleges that the defendants did these things in several instances because they feared the public might lose confidence in some financial institutions. The reason they wanted to prevent this, according to ACC's amended complaint, was that defendants wanted to obtain and retain deposits for institutions which employed the NDIGC board member defendants. S. E. and Marvin Copple are also accused of causing Commonwealth to become insolvent by converting its assets. Petitioner's Appendix S-21 – S-24. According to ACC, the above acts were accomplished through wire and mail fraud, and violated RICO. Petitioner's Appendix S-24 – S-25.

Plaintiff's allegation of indirect injury.

Plaintiff alleges that its assignors relied on the advertisements of NDIGC guarantees when they loaned money to or deposited it with Commonwealth, or failed to obtain their funds from Commonwealth. Petitioner's Appendix S-20, ¶8F. It alleges that:

> 9. As a direct and proximate result of the foregoing acts and omissions of the Defendants, the Plaintiffs lost their *money tendered and paid to Commonwealth* or *deposited with and retained by Commonwealth* or their *credit extended to Commonwealth,* in the Amount of $58,000,000.00.

Petitioner's Appendix S-24 (emphasis added).

The dismissal by the U.S. District Court for the District of Nebraska.

As indicated in petitioner's Petition at 5-6, this case had been appealed to the U.S. Court of Appeals for the Eighth Circuit after District Judge Lyle E. Strom had dismissed ACC's complaint for failure to allege multiple schemes establishing a pattern of racketeering under RICO. Petitioner's Appendices E & J. After the case was appealed, however, this Court announced its decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*[22] The Eighth Circuit therefore remanded to the district court on November 15, 1989, for reconsideration under *H.J. Inc.* Petitioner's Appendix K. The mandate ordered the district court to certify any order on the motion to dismiss to the Court of Appeals, and stated that the appellate court retained jurisdiction for further proceedings. Petitioner's Appendix K-3.

On remand, defendants were granted leave to file amended motions to dismiss, and amended motions were filed by most of the defendants. Petitioner's Appendix G-2 – G-3. Among the grounds raised in the amended motions were whether the plaintiff had standing or whether the receiver of Commonwealth was the only person who could assert the claim, whether it had alleged "proximate cause," and whether the defendant's alleged actions were the "legal cause" of plaintiff's damages. Respondents' Appendix at 2, 6, 11. The amended motions to dismiss were heard March 9, 1990, and the district court deferred ruling until the Nebraska Supreme Court

---

[22] 492 U.S. 229 (1989).

ruled on standing issues in a related case brought by the ACC in Nebraska state court.[23] Petitioner's Appendix G-3. The Nebraska Supreme Court's opinion was rendered in that case on May 11, 1990, and held that the ACC's state claims were derivative, and should properly have been asserted by the receiver of Commonwealth.[24] On June 17, 1990, plaintiff ACC moved for partial summary judgment, contending it had standing as a matter of law, and the Nebraska Supreme Court's holding that ACC's actions were derivative did not control the result in this federal action. Respondent's Appendix at 13 – 69.

On August 24, 1990, the U.S. District Court granted the defendants' amended motions to dismiss on the basis that ACC was not directly injured in its property within the meaning of RICO and therefore did not have standing. Petitioner's Appendix G-4. Relying on *In re Sunrise Securities Litigation*,[25] Judge Strom held that an indirectly injured party did not have standing under RICO, but should look to the directly injured party for recovery – in this case the Commonwealth receiver. Petitioner's Appendix G-4.

Plaintiff's attempt to amend after dismissal.

In the district court's order of August 24, 1990, the case was certified to the Eighth Circuit in accordance

---

[23] *Weimer v. Amen*, Doc. 422, Page 192 (District Court of Lancaster County, Nebraska, filed Oct. 28, 1987).

[24] *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

[25] 108 B.R. 471 (E.D. Pa. 1971). The district court's opinion in *Sunrise Securities* was subsequently affirmed: 916 F.2d 874 (3d Cir. 1990).

with the previous mandate of the Court of Appeals. Petitioner's Appendix H-1; K-3. Thirty days later, on September 24, 1990, ACC moved for relief from the judgment under Fed. R. Civ. P. 60 so it could amend its complaint. Petitioner's Appendix M-1; N-4. The District Court denied the motion on the basis that jurisdiction was in the Court of Appeals. Petitioner's Appendix O-1.

Affirmance by the U.S. Court of Appeals for the Eighth Circuit.

The Court of Appeals affirmed the dismissal of the amended complaint on the basis of the district court's opinion, also citing the Third Circuit's opinion in *In re Sunrise Securities Litigation*,[26] and held that the district court did not abuse its discretion in denying leave to file an amended complaint. Petitioner's Appendix A-3.

SUMMARY OF ARGUMENT

First question for review: Review of the ACC's standing claim is unnecessary

Holmes v. SIPC, 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), disposes of the first question presented by ACC and makes it unnecessary to grant certiorari. The courts below held ACC lacked standing because it was not directly injured by the RICO violations alleged. Using this same rationale, ACC's alleged injury

[26] 916 F.2d 874 (3d Cir. 1990).

was not proximately caused by defendants' wrongdoing, according to the holding in *Holmes*.

Both Nebraska and federal law hold ACC was only indirectly injured. The Nebraska Supreme Court has held that all of Commonwealth's creditors' claims were taken over by its receiver.[27] The result under federal law is the same, whether federal common law is based on state law or other federal sources.[28] Since ACC's claim is only derivative and the Commonwealth receiver is the proper party to assert its claim, the plaintiff's loss was not proximately caused by defendant's alleged RICO violations, according to the clear holding of *Holmes*.

Second question for review: There was no abuse of discretion in not granting leave to further amend the amended complaint.

The decision not to allow further leave to amend was not an abuse of discretion, and there are no circumstances which would dictate that this issue should be reviewed by the U.S. Supreme Court.

For at least eight months before dismissal, ACC was aware defendants' amended motions to dismiss contended that the receiver was the proper party to assert ACC's alleged claim, yet it made no attempt to amend. After the Nebraska Supreme Court held ACC's claims

---

[27] *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

[28] *Compare* the district court and court of appeals decisions in *In re Sunrise Securities Litigation*, 108 B.R. 471 (E.D.Pa. 1989), *aff'd*, 916 F.2d 874 (3d Cir. 1990).

were derivative, ACC still stood on its amended complaint in federal court, and even moved for summary judgment on the issue. Only after the district court had ruled unfavorably to ACC on the motion to dismiss and certified its ruling to the Court of Appeals did ACC ask to amend, and then by a belated motion to reconsider under Rule 60. The Court of Appeals reviewed this question and held the District Judge did not abuse his discretion.

Finally, there is no reasonable prospect that plaintiff will be able to allege it was proximately injured, as required by *Holmes v. SIPC*, and it would be fruitless to allow another opportunity to amend.

ARGUMENT

I. Review of the ACC's standing claim is unnecessary.

The first question presented by the ACC argues that it had standing to assert RICO claims against defendants. The Court's recent opinion in *Holmes v. SIPC*[29] forecloses that argument. There, the Court held that an indirect injury may not be asserted as a basis for relief under RICO, because such injury is not proximately caused by the RICO violation.[30]

---

[29] 503 U.S. ___, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

[30] Apparently, the ACC was unaware of *Holmes* when it filed its petition. Although the ACC's petition for writ of certiorari was filed approximately two months after the Court

(Continued on following page)

In *Holmes*, the Securities Investor Protection Corporation (SIPC) asserted claims of investors whose losses were allegedly due to defendants' false representations and stock manipulation in violation of RICO; the investors' losses had occurred when their brokers became insolvent. The Court determined that SIPC's claims did not satisfy the proximate cause requirement of direct injury under RICO:

> [T]he link is too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers. That is, the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims. Although the customers' claims are senior . . . to those of the broker-dealers' general creditors, . . . the causes of their respective injuries are the same: The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors.
>
> As we said, however, in *Associated General Contractors*, quoting Justice Holmes, " 'The general tendency of the law, in regard to damages at least, is not to go beyond the first step.' " 459 U.S., at 534, 103 S.Ct., at 906 . . . , and the

---

(Continued from previous page)

announced *Holmes*, ACC does not cite the opinion and appears to be unaware of the Court's holding that indirect injuries do not satisfy the proximate cause requirement of RICO. *See*, ACC's Petition at 8, 9, 13 and 14.

> reasons that supported conforming Clayton Act causation to the general tendency apply just as readily to the present facts, underscoring the *obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of § 1964(c).*[31]

The Court emphasized that the rationale for limiting recovery under the Clayton Act to those directly injured by its violation applied with equal force to RICO actions, namely: 1) allowing indirectly injured claimants to sue would require the court to determine complicated damage causation questions concerning the extent losses were caused by wrongdoers, and not by other unrelated factors; 2) the recovery would then have to be apportioned between the parties suffering direct and indirect losses; 3) directly injured parties can be expected to bring suit for the law's vindication; 4) allowing indirectly injured claimants to sue might permit them to circumvent the relative priority of their claims under applicable liquidation proceedings.[32]

The Court rejected any suggestion that its holding restricting RICO actions to directly injured plaintiffs would detract from the policies underlying the act:

> There is, for that matter, nothing illiberal in our construction: We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers, or SIPC in their stead, are *not proper plaintiffs.* Indeed, we fear that RICO's remedial purposes

---

[31] *Id.*, at ___, 112 S.Ct. at 1319-20 (citation and footnotes omitted; emphasis added).

[32] *Id.* at ___, 112 S.Ct. at 1321-22.

> would more probably be hobbled than helped by SIPC's version of liberal construction: *Allowing suits by those injured only indirectly would open the door to "massive and complex damages litigation[, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damage suits." Associated General Contractors,* 459 U.S., at 545, 103 S.Ct., at 912.[33]

In the instant case, the opinion of the district court was squarely based on the ACC's failure to allege any direct injury; as a result Judge Strom held that ACC was not injured within the meaning of RICO:

> "An individual indirectly injured by a RICO violation cannot maintain a RICO action in his or her own name, since his or her claims are derivative of the directly injured parties' claims; 'an indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer for relief.' " *In re Sunrise Sec. Litigation,* 108 Bankr. 471 (E.D. Pa. 1989) (quoting *Carter v. Berger,* 777 F.2d 1173, 1176 (7th Cir. 1985)).
>
> In general, wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover. *In re Longhorn Sec. Litigation,* 573 F.Supp. 255 (W.D. Okla. 1983) (*citing Adato v. Kagan,* 599 F.2d 1111 (2d Cir. 1979)). Under such circumstances, "[t]he damage to depositors is indirect only, and it is generally recognized that for such matters, the depositor has no direct and individual right of

---

[33] *Id.* at ___, 112 S.Ct at 1321 (emphasis added).

> action against the director." *Michelsen v. Penney*, 10 F. Supp. 537, 539 (S.D.N.Y. 1934) quoted in *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989). . . .

District Court Memorandum Opinion, Petitioner's Appendix G-4.

Although the stated basis for dismissal of ACC's amended complaint was lack of standing, the reason behind the dismissal was the same as for this Court's holding in *Holmes*: an indirectly injured party is not "injured in his business or property" within the meaning of RICO.[34]

The reasons for applying the direct injury limitation are especially relevant to the instant dispute. The ACC's assignors (which ACC now suggests number 2,650[35]) are a mixed bag of Commonwealth creditors, including depositors, investors, general creditors, and payees of uncollected checks written by depositors. Petitioner's Appendix S-2. If the ACC were allowed to proceed and should it be able to establish liability, the district court would be saddled with trying to determine whether each

---

[34] In *Holmes* the Court held the question of proximate cause was "fairly included" within the question of standing on which certiorari was granted for purposes of Supreme Court Rule 14.1(a). *Id.* at ___, 112 S.Ct. at 1317, n. 12. The concept of proximate cause is clearly related to standing, as Justice Marshall's dissent recognized in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 512, 105 S.Ct. 3275, 3299, 87 L.Ed.2d 346 (1985):

> Court-developed standing rules define the requisite proximity between the plaintiff's injury and the defendant's . . . violation. . . .

[35] ACC's petition at 3, n. 2.

individual's damages resulted from alleged misconduct which ACC urges against the defendants or from causes such as the economic climate which gave rise to financial weakness of Commonwealth, or embezzlement by Commonwealth's officers which was separate and distinct from the RICO violations alleged against other defendants.[36] These are exactly the types of problems which compelled the Court to limit RICO plaintiffs to those who have suffered direct injury.

Preventing the ACC from pursuing its indirect injuries is also consistent with the Court's desire to limit priority circumvention. The Nebraska Supreme Court expressed the same concern when it rejected the ACC's constitutional challenge to the state's receivership statutes:

> The statutory scheme of a receivership seeks to avoid preferences among creditors, to avoid a multiplicity of lawsuits and races to the courthouse, and to give the receiver meaningful authority to pursue claims, negotiate compromise settlements, and execute binding releases. . . . We have determined that § 8-199 allows the receiver to enforce the appellants' causes of action. . . . [T]he enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure

---

[36] Both S.E. and Marvin Copple were convicted of wrongdoing after the Commonwealth collapse. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *see, Weimer v. Amen*, 870 F.2d 1400 (8th Cir. 1989).

> compensation for all creditors in an equitable and nonpreferential manner.[37]

Finally, if there were grounds for a RICO suit, there is no reason that the directly injured party could not have pursued it. The Commonwealth receiver, as the person statutorily responsible for collecting claims owing to Commonwealth and its creditors, including ACC, could have asserted an action under RICO, and any recovery would redound to the benefit of corporate creditors in the proper priority, as determined by the receivership court. As the Court reasoned in *Holmes*:

> In sum, subrogation to the rights of the manipulation conspiracy's secondary victims does, and should, run afoul of proximate-causation standards, and SIPC must wait on the outcome of the trustees' suit. If they recover from Holmes, SIPC may share according to the priority SIPA gives its claim.[38]

Similarly, here the ACC's claim on behalf of Commonwealth creditors was not proximately caused by the alleged RICO violations of the respondents. The receiver of Commonwealth is entitled to pursue those claims under *Neb. Rev. Stat.* § 8-199 (1987).[39] If the receiver had chosen to sue under RICO and had been successful, ACC

---

[37] *Weimer v. Amen, supra,* 235 Neb. at 299-300, 455 N.W.2d at 154.

[38] *Holmes, supra,* at ___, 112 S.Ct. at 1321.

[39] This statute is set forth under "Statutes Which This Case Involves" in the preliminary portion of this brief.

would be entitled to share in that recovery according to the priority of its assignors' claims.[40]

It is likely that if the ACC had been aware of the Court's decision in *Holmes* it would have attempted to justify its petition by asserting that it was directly injured by defendants, even though it is clear that its damages only arise because of Commonwealth's inability to satisfy the claims of its creditors. The argument the ACC was directly injured has already been rejected by the federal district court,[41] the Court of Appeals for the Eighth Circuit,[42] and the state district and supreme courts.[43] Although there may be a question about which law applies to determine the question, there can be no doubt that the injuries asserted by ACC are indirect under both state law and the federal opinions on the subject.

While federal law governs RICO actions, the source of federal common law on the question of whether a claimant's injury is direct or indirect is not definitely

---

[40] Although the Commonwealth receiver has not sued the defendants, that does not detract from the reasons for holding that the ACC's alleged injury was not proximately caused by the alleged RICO violations. Instead, it is likely that the receiver's decision not to bring an action against these parties represents a realistic and rational assessment of the chances of succeeding in such an action. *See, e.g.*, footnotes 20 and 21, *supra*. In fact, the Nebraska Supreme Court has characterized the ACC's claims as "relatively worthless." *Haman v. Marsh*, 237 Neb. 699, 720, 467 N.W.2d 836, 851 (1991).

[41] Petitioner's Appendix G.

[42] Petitioner's Appendix A.

[43] *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).

settled. For example, in *In re Sunrise Securities Litigation*,[44] the district court concluded the federal common law that determined whether the claim of a depositor in a failed bank was derivative or direct was set forth in federal courts' decisions.[45] The court noted, however, that the law of Florida, where the claim arose, was consistent with federal law on the issue.[46] On appeal of *Sunrise Securities*, the Third Circuit affirmed the lower court, but disagreed with the lower court's conclusion on the source of law to be applied, holding that state corporate law determined whether the claim was derivative, relying on *Burks v. Lasker*, 441 U.S. 471, 477-78, 99 S.Ct. 1831, 1836-37 (1979).[47] The appellate court opinion also made it clear, however, that the result would be the same under the federal decisions.[48]

In the instant matter, District Judge Strom relied on the lower court opinion in *In re Sunrise Securities* to find that the ACC's claim was indirect, but noted that the result was consistent with the Nebraska Supreme Court's decision in *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990).[49] In affirming this case, the Eighth Circuit relied

---

[44] 108 B.R. 471 (E.D. Pa. 1989).

[45] *Id.* at 476, n. 6.

[46] *Id.*

[47] *In re Sunrise Securities Litigation*, 916 F.2d 874, 879 (3d Cir. 1990); *see also, Kamen v. Kemper Financial Services, Inc.*, ___ U.S. ___, 111 S.Ct. 1711 (1991).

[48] *In re Sunrise Securities Litigation, supra*, 916 F.2d at 880-81.

[49] District Court's Memorandum Opinion, Petitioner's Appendix G-5 – G-6.

on Judge Strom's opinion, and also cited the Third Circuit's opinion in *Sunrise Securities.*[50]

Here, there is no need to decide whether federal or state law governs the determination of whether the claims of creditors in a failed bank are indirect. As a comparison of the Nebraska court's opinion in *Weimer v. Amen* with the federal district court's and Third Circuit's opinions in *Sunrise Securities* makes clear, Nebraska law and federal law are the same; in fact, the Nebraska court relied on the district court opinion in *In re Sunrise Securities Litigation, supra,* to conclude that ACC's claim was derivative under Nebraska law.[51] Both state and federal law therefore clearly hold ACC was indirectly injured. As such, ACC's damages were not proximately caused by the RICO violations it has alleged.

In short, *Holmes* has already determined the issues which ACC has identified in its first question for review. In the instant case, as in *Holmes*, the ACC's assignors' losses occurred only because of Commonwealth's insolvency; if Commonwealth had been able to pay its debts, ACC's assignors would not have been damaged, regardless of whether defendants violated RICO. As in *Holmes*, injury to Commonwealth's creditors, including ACC's assignors, is connected to defendants' alleged wrongdoing only by the failure of Commonwealth. As such, the ACC's alleged damages are indirect, and not proximately caused by the alleged RICO violations.[52] With the

---

[50] Court of Appeals Opinion, Petitioner's Appendix A-3.

[51] *Weimer v. Amen*, 235 Neb. at 297, 455 N.W.2d at 153.

[52] *Holmes, supra,* at ___, 112 S.Ct. at 1319.

guidance of *Holmes* now available, there is no need for review. The Court's decision in *Holmes* makes it clear that the decisions below were entirely correct.

II. There was no abuse of discretion in not allowing further leave to amend before dismissing ACC's amended complaint.

Petitioner also seeks to have this Court review whether it was proper to dismiss its amended complaint without leave to amend. There is no important or special reason why this Court should consider that issue, as required by Supreme Court Rule 10.1(a).

The decision of whether leave to amend should be granted is committed to the discretion of the district court.[53] The Court of Appeals has already reviewed the question and found the trial court did not abuse its discretion in this regard. Petitioner's Appendix A-3.

ACC was well aware of the defendants' contentions that the receiver of Commonwealth was the proper party to assert these claims, since defendants had successfully raised this defense in their state court suit.[54] Subsequently the issue was brought to a head in the instant matter by defendants' filing of amended motions to dismiss in December of 1989. Respondents' Appendices 1, 2 and 3. The federal district judge announced that he would await ruling on the issue of standing until the

---

[53] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 328 (1971).

[54] *Weimer v. Amen*, 235 Neb. 287, 290, 455 N.W.2d 145, 149 (1990).

Nebraska Supreme Court decided the appeal of the state court action. When that appeal was decided it was adverse to the ACC; the Nebraska court held creditors' claims had to be asserted by the receiver of Commonwealth.[55] Although the handwriting was thus clearly on the wall, ACC did not attempt to amend its federal complaint. Instead it moved for summary judgment on the issue. Respondents' Appendix 4.

Even after the district court had dismissed the amended complaint, ACC took no action to attempt to amend in a timely way. Thirty days after the case had already been certified to the Court of Appeals, the ACC finally moved for relief under Rule 60.

Obviously, ACC's belated motion for relief from the judgment was both dilatory and late. Moreover, it came after the respondents and the district court had expended considerable time and resources addressing the ACC's intransigent contention that it, and not the Commonwealth receiver, was the proper party to raise its RICO claims. Under these circumstances it was not an abuse of discretion to dismiss the amended complaint without granting leave to amend.[56]

Finally, it is patent that any injuries to the Commonwealth creditors who are the assignors of ACC are indirect, as discussed in our argument on ACC's first question. ACC cannot, therefore, allege that its damages were proximately caused by a RICO violation. *Holmes v.*

---

[55] *Id.* at 296-98, 455 N.W.2d at 152-53.

[56] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*, at 330-32; *see, Foman v. Davis*, 371 U.S. 178, 182 (1962).

SIPC, supra. For this reason, it would serve no useful purpose to allow further amendment.

CONCLUSION

The questions which the Petitioner would have this Court review are already well-settled by the Court's prior opinions. The amended complaint was properly dismissed for failure to allege a claim under RICO, and there was no abuse of discretion in not giving plaintiff leave to further amend.

Accordingly the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RODNEY M. CONFER

KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

Counsel of Record
for Respondents

RODNEY M. CONFER
TREV E. PETERSON
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

Counsel for:

Commerce Group, Inc., Commerce Savings Lincoln, Inc., Commerce Savings Columbus, Inc., and Commerce Savings Scottsbluff, Inc.

WILLIAM D. KUESTER
CROSBY, GUENZEL, DAVIS, KESSNER & KUESTER
400 Lincoln Benefit Life Bldg.
Lincoln, Nebraska 68508
(402) 475-5131

Counsel for:

Provident Federal Savings Bank

THOMAS L. KIMER
FAEGRE & BENSON
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, Minnesota 55401
(612) 336-3000

PAUL M. SCHUDEL
WOODS & AITKEN
1500 American Charter Center
Lincoln, Nebraska 68508
(402) 474-0321

Counsel for:

First Savings Company Of Grand Island, First National Bank Of Grand Island, and Norwest Corporation

DONALD B. STENBERG
CHARLES E. LOWE
Attorney General's Office
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Counsel for:

Paul Amen

KATHRYN J. DERR
DIXON & DIXON
One First National Center #1800
16th & Dodge
Omaha, Nebraska 68102
(402) 345-3900

Counsel for:

American Savings Company

GERALD P. LAUGHLIN
JILL ROBB ACKERMAN
BAIRD, HOLM, MCEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68102
(402) 344-0500

Counsel for:

Kenneth Wellman, William Beckman, Douglas Alford, Alfred Adams, Kenlon Hake, Roy Ashcraft, Darrell Anderson, Timothy Spoeneman, and Denis Appelbee

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, for Himself; and ASSOCIATION OF COMMONWEALTH CLAIMANTS, an Unincorporated Association, Plaintiffs, vs. PAUL AMEN; S. E. COPPLE; MARVIN COPPLE; and MEMBERS OF THE NEBRASKA DEPOSITORY INSTITUTION GUARANTY CORPORATION, Defendants.	CV 86-L-248 **AMENDED MOTION TO DISMISS AMENDED COMPLAINT OR FOR MORE DEFINITE STATEMENT, AND MOTION FOR SEPARATE TRIALS** (Filed Dec. 22, 1989)

COME NOW Defendants, Kenneth Wellman, William Beckman, Douglas Alford, Alfred Adams, Kenlon Hake, Roy Ashcraft, Darrell Anderson, Timothy Spoeneman, and Denis Applebee, and hereby move the Court as follows:

1. For an order dismissing the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted for, without limitation, the following reasons:

A. The amended petition fails to satisfy the essential elements of a claim under RICO.

(1) Plaintiffs have not adequately alleged a "pattern" of racketeering activity;

(2) Plaintiffs have not adequately alleged proximate cause;

(3) Plaintiffs have not adequately alleged the existence of an "enterprise";

(4) Plaintiffs have not adequately alleged that Defendants "conducted" the affairs of the purported enterprise;

(5) Plaintiffs have not adequately alleged valid predicate acts;

(6) Plaintiffs have not adequately alleged predicate acts with sufficient particularity; and

(7) Plaintiffs have not adequately alleged the requisite elements of a conspiracy.

B. Plaintiffs are without standing to assert the claims set forth in the amended complaint, and are collaterally estopped from asserting that standing for such claims is proper with anyone other than the Receiver of Commonwealth;

C. To the extent that RICO permits an action against these defendants for engaging in a "patter of racketeering activity," RICO fails to set forth prohibited conduct with sufficient definiteness, is unconstitutionally vague and denies defendants due process.

D. The Court should abstain from exercising jurisdiction to apply RICO in a case such as this, which involves a systematically regulated state concern.

E. Defendants are immune from liability, as all activities alleged to have been undertaken were in the performance of their powers

and duties as directors of the Nebraska Depository Institution Guaranty Corporation.

2. Alternatively, Defendants move the Court pursuant to Federal Rule of Civil Procedure 12(e) for an order requiring the Plaintiffs to make their amended complaint more definite and certain in the particulars discussed in Defendants' original motion to dismiss the amended complaint.

3. Defendants also move the Court pursuant to Federal Rule of Civil Procedure 42(b) for an order granting separate and severed trials for each Defendant.

Dated this 22nd day of December 1989.

KENNETH WELLMAN, WILLIAM BECKMAN, DOUGLAS ALFORD, ALFRED ADAMS, KENLON HAKE, ROY ASHCRAFT, DARRELL ANDERSON, TIMOTHY SPOENEMAN, and DENIS APPLEBEE, Defendants,

By /s/ Gerald P. Laughlin
Gerald P. Laughlin (#12414)
Steven D. Davidson (#18684)
of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodman Tower
Omaha, Nebraska 68102
(402) 344-0500

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Amended Motion to Dismiss Amended Complaint or for More Definite Statement, and Motion for Severance was served upon they [sic] following parties by regular United States mail, first-class postage prepaid, on this 22nd day of December 1989.

Mr. David A. Barron
Cline, Williams, Wright, Johnson & Oldfather
1900 FirsTier Bank Building
Lincoln, Nebraska 68508

Mr. Gregory H. Perry
Perry, Guthery, Haase & Gessford, P.C.
1400 FirsTier Bank Building
Lincoln, Nebraska 68508

Mr. Gary L. Dolan
Knudsen, Berkheimer, Richardson & Endacott
1000 NBC Center
Lincoln, Nebraska 68508

Mr. Charles D. Humble
Erickson & Sederstrom, P.C.
400 Cornhusker Plaza
301 South 13th Street
Lincoln, Nebraska 68508

Mr. Thomas L. Kimer
Faegre & Benson
2300 Multifoods Tower
33 South Sixth Street
Minneapolis, Minnesota 55402

Mr. William D. Kuester
Crosby, Guenzel, Davis, Kessner & Kuester
400 Lincoln Benefit Life Bldg.
Lincoln, Nebraska 68508

Mr. James B. Cavanagh
Erickson & Sederstrom, P.C.
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114

Mr. Charles E. Lowe
Assistant Attorney General
2115 State Capital
Lincoln, Nebraska 68509

Mr. Robert R. Gibson
Professional Legal Associates of Nebraska, P.C.
P. O. Box 80826
Lincoln, Nebraska 68501

/s/ Gerald P. Laughlin

n12209a.227

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, et al., Plaintiffs, v. PAUL AMEN, et al., Defendants.	CASE NO. CV. 86-L-248. AMENDED MOTION OF PROVIDENT FEDERAL SAVINGS BANK FOR DISMISSAL OF PLAINTIFFS' (Filed Dec. 21, 1989)

COMES NOW the defendant, Provident Federal Savings Bank pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Court's Order of December 11, 1989, and moves the Court for an order dismissing the plaintiffs' Amended Complaint for the reasons that the Association of Commonwealth Depositors lacks standing; that the plaintiffs' claim for relief, if any, is barred by the statute of limitations; that the Amended Complaint fails to state a claim upon which relief may be granted against Provident Federal Savings Bank; and for the further reason that 18 U.S.C. § 1962 and 1964 are unconstitutional under the Due Process Clause of the United States Constitution.

In accordance with the Court's order of December 11, 1989, a brief in support of this Motion for Dismissal will be filed and served upon opposing counsel on or before January 22, 1990.

Dated this 21st day of December, 1989.

PROVIDENT FEDERAL SAVINGS BANK, Defendant,

BY: CROSBY, GUENZEL, DAVIS, KESSNER & KUESTER
Attorneys at Law

400 Lincoln Benefit Building
Lincoln, Nebraska 68508
Telephone (402) 475-5131

By /s/ William D. Kuester
William D. Kuester (12342)
One of Said Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Amended Motion of Provident Federal Savings Bank for Dismissal of Plaintiffs' Complaint to be served on the following parties, by mailing a copy thereof by United States Mail, postage prepaid, on the 21st day of December, 1989, to the following:

Robert R. Gibson
P. O. BOX 80826
Lincoln, Nebraska 68501-0826

Louis Michael Thrasher
202 South 11th Street, Suite 203
Lincoln, Nebraska 68508

David Herzog
1400 First National Center
Omaha, Nebraska 68102

James B. Cavanagh
Erickson & Sederstrom, P.C.
One Merrill Lynch Plaza
10330 Regency Parkway Drive
Omaha, Nebraska 68114

Robert L. Nefsky
Rembolt, Ludtke, Parker,
Milligan & Berger
1201 Lincoln Mall, Suite 102
Lincoln, Nebraska 68508

Gerald Laughlin and Jill Ackerman
Baird, Holm, McEachen,
Pedersen, Hamann & Strasheim
1500 Woodmen Tower
Omaha, Nebraska 68102

Thomas L. Kimer
Faegre & Benson
2300 Multifoods Tower
33 South 6th Street
Minneapolis, Minnesota 55402

Tim Streff
Calkins & Streff
Suite 650, The Xerox Building
7171 Mercy Road
Omaha, Nebraska 68106

Greg Perry and John Guthery
Perry, Perry, Witthoff,
Guthery, Haase & Gessford, P.C.
1400 FirsTier Bank Building
Lincoln, Nebraska 68508

David Barron and Stephen Nelsen
Cline, Williams, Wright, Johnson & Oldfather
1900 FirsTier Bank Building
Lincoln, Nebraska 68508

Charles E. Lowe
Assistant Attorney General
Suite 2115 State Capitol Building
Lincoln, Nebraska 68509-4906

Gary Dolan and Trev Peterson
Knudsen, Berkheimer, Richardson & Endacott
1000 NBC Center
Lincoln, Nebraska 68508

Benita M. Seliga
FDIC
206 South 108th Avenue
Omaha, Nebraska 68154

John Bernstein
Dixon, Dixon & Minahan, P.C.
1900 One FirsTier Center
16th & Dodge Streets
Omaha, Nebraska 68102

/s/ William D. Kuester
William D. Kuester

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE T. WEIMER, et al., Plaintiffs,	)	CV. 86-L-248.
v.	)	
PAUL AMEN, et al., Defendants.	)	

AMENDED MOTION TO DISMISS OF COMMERCE GROUP, INC., COMMERCE SAVINGS LINCOLN, INC., COMMERCE SAVINGS COLUMBUS, INC., COMMERCE SAVINGS SCOTTSBLUFF, INC. FIRST SAVINGS COMPANY OF GRAND ISLAND, FIRST NATIONAL BANK OF GRAND ISLAND, AND NORWEST CORPORATION

(Filed Dec. 22, 1989)

COME NOW the above-named defendants ("Defendants") and hereby move the Court for an Order pursuant to Federal Rule of Civil Procedure 12(b)(6) dismissing the amended complaint herein for the reason that it fails to state a claim upon which relief may be granted, including, without limitation, in the following respects:

1. The amended complaint fails to properly allege a claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, et seq.;

2. The plaintiffs do not have standing to maintain this action.

3. RICO, to the extent that it permits an action against these Defendants for engaging in what is alleged to be a "pattern of racketeering activity", is so vague and overbroad as to deny these defendants of due process under the Fifth Amendment to the United States Constitution, and for such reason is unconstitutional.

4. The Defendants cannot be held responsible for the acts of the NDIGC directors.

5. The actions of the Defendants are immune from the alleged claims.

6. The plaintiffs' pendent state claims are not properly before the Court.

7. The Defendants' actions were not the legal cause of the plaintiffs' damages.

A separate brief in support of this Motion will be submitted on or before January 22, 1990.

FIRST SAVINGS COMPANY OF GRAND ISLAND, FIRST NATIONAL BANK OF GRAND ISLAND, and NORWEST CORPORATION, Defendants

COMMERCE GROUP, INC., COMMERCE SAVINGS LINCOLN, INC., COMMERCE SAVINGS COLUMBUS, INC., and COMMERCE SAVINGS SCOTTSBLUFF, INC., Defendants

By: FAEGRE & BENSON
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55400
(612) 336-3000

and

WOODS & AITKEN LAW FIRM
1500 American Charter
Lincoln, NE 68508
(402) 474-0321

By: KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, NE 68508
(402) 475-7011

By: /s/ Gary L. Dolan
Gary L. Dolan – #11039
One of Said Attorneys

APPENDIX 4

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	CASE NO.
vs.	)	CV86-L-248
	)	
PAUL AMEN, ET AL.,	)	(Filed July 19, 1990)

****

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

****

The Plaintiff, ASSOCIATION OF COMMONWEALTH CLAIMANTS (ACC), requests summary judgment under Federal Rules of Civil Procedure Rule 56, that ACC has standing to maintain this action. In support of this Motion, ACC shows the Court that as to this proposition there is no genuine issue as to any material fact, and ACC is entitled to judgment as a matter of law. ACC in support of this Motion, offers into evidence Exhibits 1990-A and 1990-B, attached to this Motion.

Respectfully submitted,

ASSOCIATION OF COMMONWEALTH CLAIMANTS, Plaintiff

By: /s/ Robert R. Gibson
ROBERT R. GIBSON, Bar No. 11491
PROFESSIONAL LEGAL ASSOCIATES OF NEBRASKA. P.C.
P.O. BOX 80826
LINCOLN, NE 68501-0826
402-474-1440

UNITED STATES DISTRICT COURT
NEBRASKA DISTRICT

CLAUDE T. WEIMER, ET AL.,	)	
vs.	)	CASE NO.
	)	CV-86-L-248
PAUL AMEN, ET AL.,	)	

****

CERTIFICATE OF SERVICE

****

Copies of the Motion For Partial Summary Judgment and the Brief in support of the motion were mailed on July 17, 1990, to the following attonreys [sic]:

GARY DOLAN	DAVID A. BARRON	PAUL SCHUDEL
1000 NBC Center	1900 FirsTier Bldg	206 South 13th St.
Lincoln, NE 68508	Lincoln, NE 68508	Suite 1500
		Lincoln NE 68508
GREGORY H. PERRY	THOMAS L. KIMER	GERALD P. LAUGHLIN
1400 FirsTier Bldg.	2200 Norwest Center	1500 Woodmen Tower
Lincoln, NE 68508	90 7th Street, South	Omaha, NE 68102
	Minneapolis, MN 55400	
WILLIAM D. KUESTER	ROBERT SPIRE & CHARLES LOWE	
400 Lincoln Benefit Life Bldg	ATTORNEY GENERAL	
	2115 STATE CAPITOL	
Lincoln, NE 68508	Lincoln, NE 68059	

/s/ Robert R. Gibson
Robert R. Gibson

Exhibit 1990-A

DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

CLAUDE T. WEIMER, for Himself and ASSOCIATION OF COMMONWEALTH CLAIMANTS, an Unincorporated Association,	)	DOCKET 422 PAGE 192
Plaintiffs,	)	
vs.	)	
PAUL AMEN, MEMBERS OF THE NEBRASKA DEPOSITORY INSTITUTION GUARANTY CORPORATION, et al., (Described in Exhibit A)	)	
Defendants.	)	

****

AMENDED PETITION

****

PARTIES

1. The Plaintiff, CLAUDE T. WEIMER (Weimer) is a citizen and resident of Lincoln, Lancaster County, Nebraska, and President of the Association of Commonwealth Claimants (ACC).

2. The Plaintiff, ACC, is an unincorporated association in Lincoln, Lancaster County, Nebraska. ACC brings these causes of action as the assignee of creditors of Commonwealth Savings Company of Lincoln (Commonwealth). The assignments are in writing, filed with the amended petition, and incorporated in the amended petition by reference. Exhibit 1 attached to the amended petition is also incorporated in the amended petition by reference. Exhibit 1 states the

number of each cause of action, the name of each assignor whose cause is assigned, and the date of the assignment. The causes of action of each assignor, assigned to ACC, incorporate by reference the allegations of paragraph 1, paragraphs 3 through 64, and the Prayer For Relief of the amended petition.

3. The Defendant, PAUL AMEN (Amen), is a citizen and resident of Lincoln, Lancaster County, Nebraska. Amen was director of the Department of Banking and Finance of the State of Nebraska from January 6, 1979 to November 1, 1983.

4. The Defendants, Kenneth A. Wellman (Wellman); William C. Beckman (Beckman); Douglas G. Alford (Alford); Alfred H. Adams (Adams); Kenlon H. Hake (Hake); Roy L. Ashcraft (Ashcraft); Darrell D. Anderson (Anderson); Timothy R. Spoeneman (Spoeneman); Denis K. Applebee (Applebee); Herbert Heumann (Heumann); and Allan C. Roemmich (Roemmich) were at various times Directors of the Nebraska Depository Institution Guaranty Corporation (NDIGC).

5. A. Commerce Savings Columbus, Inc., became a member of NDIGC August 6, 1979, and was the employer of Wellman from then until at least May 25, 1982.

B. Commerce Savings Lincoln, Inc., became a member of NDIGC August 6, 1979, and employed Alford as its President from at least August 6, 1979, to the present.

C. Commerce Savings Scottsbluff, Inc., became a member of NDIGC August 6, 1979, and employed Spoeneman as its President from at least August 6, 1979, to the present.

6. A. First National Bank of Grand Island merged with First Savings Company of Grand Island (First Savings) on April 13, 1984. First Savings became a member of NDIGC on August 6, 1979, and employed Beckman as its Senior Vice President and Chief Executive Officer from at least August 6, 1979, to at least October 27, 1983.

   B. Provident Federal Savings Bank (Provident) merged with Liberty Savings Company (Liberty) on November 18, 1983. Liberty became a member of NDIGC on August 6, 1979, and employed Applebee as its President from at least August 6, 1979, to at least November 1, 1983.

   C. Union Bank & Trust Company (Union) merged with Northeast Savings & Investment Co. (Northeast) on November 18, 1983. Northeast became a member of NDIGC on August 2, 1979, and employed Heumann as its President from at least August 2, 1979, until November 15, 1983.

   D. American Security Bank (American Security) merged with American State Savings Company (American State) on July 14, 1983. American State became a member of NDIGC August 3, 1979, and employed Ashcraft as its Executive Vice President from at least August 3, 1979, until at least August 26, 1983.

7. The Defendants named in this paragraph 7, knowingly joined the conspiracy described in paragraphs 31 through 38 below. They are Nebraska banking corporations and Nebraska residents, as follows:

   A. Omaha National Bank & Trust Co., Omaha, Nebraska (Omaha National);

   B. First National Bank of Omaha, Omaha, Nebraska (First National Omaha);

C. Dennis O'Neal (O'Neal), Omaha, Nebraska, employed by First National Omaha;

D. Robert Short (Short), Omaha, Nebraska;

E. Barry Lake (Lake), Lincoln, Nebraska, Counsel for the Department of Banking and Finance of the State of Nebraska between January 6, 1979 and November 1, 1983;

F. James Moylan (Moylan) executive director of NDIGC.

JURISDICTION

8. This action arises from acts, omissions, and representations of the Defendants named in paragraphs numbered 3 through 7 above, in the course and scope of their employment or corporate operations in Nebraska described in paragraphs numbered 3, 4, 5, 6, and 7 above. The Plaintiff, ACC, is an assignee as defined in Section 25-302, R.R.S. Neb. 1943 and an unincorporated association as defined in Section 25-313, R.R.S. Neb. 1943. ACC was formed for the following purposes:

A. To call attention to facts and law related to the insolvency of Commonwealth; and

B. To receive, hold, and act upon assignments of causes of action arising from the insolvency of Commonwealth.

This action arose in Lancaster County, Nebraska within the meaning of Section 25-404, R.R.S. Neb. 1943 (action against a public officer). In addition, three of the Defendant corporations have their principal places of business in Lancaster

County, Nebraska within the meaning of Section 25-405, R.R.S. Neb. 1943 (actions against domestic

corporations). The Defendants Amen, Alford, Adams, Hake, Heumann, and Lake have their places of residence in Lancaster County, Nebraska.

9. Various Defendants became directors of NDIGC and remained directors as follows:

NAME	BEGINNING DATE	END OF TERM
Adams	before 02/01/79	08/16/85
Alford	08/28/81	resigned between 11/01/83 and 12/01/83
Anderson	before 02/01/79	resigned 01/08/82
Applebee	before 02/01/79	resigned between 11/01/83 and 12/01/83
Ashcraft	before 02/01/79	resigned 08/26/83
Beckman	02/23/82	resigned 10/27/83
Hake	before 02/01/79	08/23/84
Heumann	09/01/83	resigned 11/15/83
Roemmich	before 02/01/79	08/16/83
Spoeneman	08/28/81	08/27/85
Wellman	before 02/01/79	05/25/82

CHRONOLOGY OF ACTS, OMISSIONS AND REPRESENTATIONS

10. The NDIGC in 1978 was chartered as a corporation in accordance with the NDIGC Act (Sections 21-17,127 through 21-17,145, R.R.S. Neb. 1943).

11. On January 6, 1979, Amen was appointed Director of the Nebraska Department of Banking and Finance. Amen continued in this office until after November 1, 1983.

12. In February 1979, Amen, Moylan, and NDIGC directors Adams, Anderson, Applebee, Ashcraft, Hake, Roemmich, and Wellman, acting in concert, developed and caused NDIGC to adopt and implement a plan. This plan required NDIGC member institutions to advertise that each deposit account in the member institutions was guarantied [sic] by NDIGC against loss up to $10,000.00. At the time this plan was adopted and implemented by NDIGC, Amen and the named Directors knew that NDIGC had insufficient assets to make good this guaranty.

13. By August 1, 1979, Amen knew that both American Savings Company of Omaha (American Savings) and Commonwealth were financially unsound and that these institutions should be declared insolvent. Amen failed to declare either institution insolvent, failed to take control of the assets and affairs of either institution, and failed to remove officers from control of either institution. Amen also failed to disclose to the public the condition of American Savings and Commonwealth.

14. On August 7, 1979, American Savings and Commonwealth were admitted to membership in NDIGC. Directors Adams, Anderson, Applebee, Ashcraft, Hake, Roemmich, and Wellman failed to examine or

consider the economic advisability of admitting to membership American Savings and Commonwealth.

15. Between August 7, 1979 and November 1, 1983, Amen, Lake, Moylan, and all NDIGC directors were guilty of the following omissions:

    A. They failed to disclose the insolvency of American Savings and Commonwealth;

    B. They took no action to declare either American Savings or Commonwealth insolvent;

    C. They took no steps to gain control of the assets and affairs of American Savings and Commonwealth;

    D. They took no action to remove or bring about removal of officers of American Savings and Commonwealth;

    E. They took no action to prevent or terminate membership in NDIGC by American Savings and Commonwealth.

    Between August 1, 1979 and November 1, 1983, Amen, Lake, Moylan, and all Directors of NDIGC were bound to know that American Savings and Commonwealth were unsound and insolvent, and that officers of American Savings and Commonwealth were acting in violation of laws of Nebraska.

16. On April 28, 1980, Amen, Moylan, and NDIGC directors Adams, Anderson, Applebee, Ashcraft, Roemmich, and Wellman caused NDIGC to adopt and implement a new member deposit guaranty. Under the new guaranty, member institutions were directed to and did advertise that each member institution deposit account was guarantied against loss up to $30,000.00. This was done even though

Amen, Moylan, and these directors knew the following:

A. That NDIGC assets were insufficient to make good this guaranty in the event of failure of a large member institution; and

B. That American Savings and Commonwealth were large insolvent member institutions.

17. On July 7 and July 16, 1982, Amen, Moylan, and NDIGC Directors Adams, Alford, Applebee, Ashcraft, Hake, Roemmich, and Spoeneman acting in concert implemented a plan to use NDIGC funds to prevent the declared insolvency of Industrial Savings Company of Omaha (Industrial Savings). Industrial Savings was not a member of NDIGC. Stockholders of Industrial Savings included the following:

S.E. Copple (president of Commonwealth);

First Security Savings Company (S.E. Copple, President);

First Savings Company (employer of Beckman);

State Security Savings (employer of Hake and Adams);

Commonwealth (employer of S.E. Copple and his son, Marvin Copple);

American Savings Company (owned by Short; formerly owned by Anderson); and

Commerce Savings Lincoln, Inc. (employer of Alford).

These stockholders were informed by Amen that Industrial Savings would have to be declared insolvent unless the stockholders invested additional capital, or some other source of new capital was

found. The plan implemented July 7 and July 16, was as follows:

A. NDIGC-member American Savings acquired Industrial Savings by merger, and absorbed Industrial Savings' deficit of $1,200,000.00;

B. Omaha National Bank loaned American Savings $450,000.00 to use on its books as capital;

C. NDIGC advanced $500,000.00 to American Savings in exchange for a capital note;

D. NDIGC loaned American Savings $700,000.00 against questionable and classified assets of Industrial Savings;

E. Amen permitted American Savings to capitalize on its books as "good will" Industrial Savings' $1,200,000.00 deficit, and to capitalize on its books the amounts described in subparagraphs 17B and C above, in order to give American Savings the appearance of an acceptable ratio of capital to liabilities.

As a consequence of these acts, done in furtherance of the plan, neither Industrial Savings nor American Savings were declared insolvent. Both institutions were in fact insolvent, but these acts unlawfully diverted NDIGC funds for the benefit of stockholders of a non-member of NDIGC and allowed a misstatement of the assets and liabilities of American Savings.

18. On December 22 and 23, 1982, Amen, Moylan, and NDIGC Directors Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, and Spoeneman, acting in concert, transferred to the Dwight Cooperative Credit Association (Dwight Coop) about $600,000.00

from the NDIGC deposit guaranty fund. This transfer was not for the purpose of paying covered claims under the NDIGC Act and was contrary to the provisions of Sections 21-17,128; 21-17,131; and 21-17,135, R.R.S. Neb. 1943.

19. About April 10, 1983, Amen, Lake, O'Neal, Moylan, and NDIGC Directors Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, and Spoeneman, acting in concert, caused to be transferred $800,000.00 from NDIGC deposit guaranty funds to a non-member institution, First National Omaha. This transfer was not for payment of covered claims under the NDIGC Act and was contrary to the provisions of Sections 21-17,128; 21-17,131; and 21-17,135, R.R.S. Neb. 1943.

PROXIMATE CAUSE

20. On November 1, 1983, Commonwealth was declared insolvent by the Department of Banking and Finance of the State of Nebraska. Commonwealth creditors lost more than $58,000,000.00 in deposits, investments, and credits as a direct consequence of the insolvency of Commonwealth. The creditors of Commonwealth had left their money in the care of Commonwealth and made additional investments and deposits in Commonwealth because of the following:

A. Misrepresentations of the Defendants concerning the facts about the security of Commonwealth deposits as described above in paragraphs 12, 14 and 16;

B. Failure of the Defendants to disclose material facts about the security of Commonwealth deposits as described above in paragraphs 12 through 19;

C. Representations of the defendants made with reckless disregard of the truth or falsity of the representations, concerning the security of Commonwealth deposits, as described above in paragraphs 12, 14, and 16.

D. Breach of the duty of disclosure by the Defendants as fiduciaries of the Plaintiffs, as described above in paragraphs 12 through 19;

E. Fraudulent, wanton, and willful diminution of the NDIGC deposit guaranty fund by the Defendants as described above in paragraphs 13, 15, and 17 through 19, and the consequent diminution of reimbursement from NDIGC funds to Commonwealth creditors;

F. Omissions by Defendants as described in paragraph 15 above.

The Commonwealth creditors received reimbursement from NDIGC for about $2,500,000.00. NDIGC now has no assets and is inoperative. The acts, omissions, and representations of NDIGC directors described in paragraphs 12 through 19 above, and the acts of Dennis O'Neal described in paragraph 19 above, were in furtherance of the corporate polices [sic] and financial interests of their corporate employers, as follows:

A. Each of the NDIGC directors, and O'Neal were authorized by their respective employers to act for the employers, and were high-level executives of the employers responsible for formulating corporate policies of the employers;

B. The acts of the NDIGC Directors and of O'Neal were done for the purposes of transferring money and attracting investments in their corporate employers, and of preventing public disclosure of wrongful acts described in paragraphs 12 through 19 above.

21. But for the acts, omissions, and representations of the Defendants described above in paragraphs 12 through 19, defalcations of Commonwealth officers and directors, and the insolvency of Commonwealth would have been discovered in early 1979. The losses of Commonwealth creditors, if any, would have been substantially less in early 1979 than on November 1, 1983.

CAUSES OF ACTION

Each of the assignors described in Exhibit 1, assigned to ACC at least the following causes of action:

I. FIRST CAUSE OF ACTION: FRAUD

22. The Plaintiffs incorporate in this First Cause of Action the allegations of paragraphs 1 through 21 above.

23. The Defendants' representations to the general public (described above in paragraphs 12 and 16) implied that NDIGC had sufficient assets to make good on the guaranties described in paragraphs 12 and 16. By admitting Commonwealth to NDIGC membership, the Defendants, named in paragraphs 14 and 15 above, impliedly represented that Commonwealth was solvent. These same defendants'

representations were false when made and the Defendants knew them to be false. The Defendants fraudulently intended the general public, including Commonwealth creditors, to rely upon these representations in deciding whether to make and leave deposits and investments in NDIGC member institutions, including Commonwealth. Commonwealth creditors reasonably relied upon these representations and as a consequence made and left deposits and investments in Commonwealth. The value of these deposits and investments finally was lost to Commonwealth creditors when NDIGC failed to make good on the guaranties. Plaintiffs were damaged in the manner described in paragraphs 20 through 21 above.

II. SECOND CAUSE OF ACTION: CONSTRUCTIVE FRAUD

24. The Plaintiffs incorporate in this Second Cause of Action the allegations of paragraphs 1 through 23.

25. The representations described in paragraph 23 above, were made with reckless disregard for the truth or falsity of the representations.

26. The Defendants named in paragraphs 12 through 19 above, had actual knowledge of facts, as described in paragraphs 12 through 19 above, material to the decisions of Commonwealth creditors whether to make and leave deposits and investments in Commonwealth. These Defendants knew these facts not to be within reach of reasonably diligent attention, observation, and judgment of the Commonwealth creditors.

27. The breaches of duty described in paragraph 28 below, tended to deceive the public, to violate public and private confidence, and to injure public interest.

28. By reason of the Defendants' breach of their duties to disclose material facts and not to make representations with reckless disregard of their truth or falsity, Commonwealth creditors were deceived to believe their deposits and investments in Commonwealth were secure. As a proximate consequence. Commonwealth creditors unwittingly became and remained vulnerable to loss of their deposits and investments in Commonwealth which occurred on and after November 1, 1983. In this way, Plaintiffs were damaged in the manner set forth in paragraphs 20 and 21 above.

III. THIRD CAUSE OF ACTION: CIVIL CONSPIRACY

29. The Plaintiffs incorporate in this Third Cause of Action the allegations of paragraphs 1 through 28.

30. Sometime during January 1979, the Defendants Amen, Moylan, Adams, Anderson, Applebee, Ashcraft, Hake, Roemmich, and Wellman combined or agreed to join together to accomplish the following unlawful purposes:

A. To conceal from the general public the true financial condition of NDIGC;

B. To lead the general public to believe incorrectly that all NDIGC member institutions were safe and secure depositories for funds;

C. To conceal from the general public the fact that if a large NDIGC member institution was declared insolvent, NDIGC did not have enough money or reinsurance to pay its deposit guaranties.

D. To induce deposits and investments in NDIGC member institutions;

E. To prevent public perception of the unsoundness of industrial loan and investment companies, in order to avoid withdrawals from NDIGC member institutions.

In pursuit of these purposes, these Defendants established the deposit guaranty advertising rules described in paragraph 12 above.

31. About August 7, 1979, the conspiracy described in paragraph 30 above, was enlarged by the same Defendants to incorporate an additional unlawful purpose. This additional purpose was to conceal from the general public the fact that American Savings and Commonwealth were financially unsound. In pursuit of the purposes of the conspiracy these Defendants undertook the acts, omissions, and representations described in paragraphs 13, 14, and 15 above.

32. About April 28, 1980, Amen, Moylan, Adams, Anderson, Applebee, Ashcraft, Roemmich, and Wellman enlarged the conspiracy described in paragraphs 30 and 31 above, to incorporate additional unlawful purposes. These additional purposes were to increase the confidence of the general public in NDIGC-member institutions by creating a false impression of security and to make them appear more attractive as depositories for funds. In pursuit of the purposes of the conspiracy, the Defendants named in this paragraph 32 undertook the acts, omissions, and representations described in paragraph 16 above.

33. Before July 1, 1982, Spoeneman knowingly became a member of the conspiracy described in paragraphs

30, 31, and 32 above, by willingly becoming a member of the NDIGC Board of Directors, and participating in acts and omissions of the NDIGC Board.

34. Before July 7, 1982, Robert Short, Barry Lake, Omaha National, Commonwealth, First Security Savings Company, and American Savings, knowingly became members of the conspiracy described in paragraphs 30, 31, and 32 above, by participating in the acts and omissions described in paragraph 17 above.

35. About July 7, 1982, the Defendants named in paragraphs 30, 32, 33, and 34 above, enlarged the conspiracy to incorporate additional unlawful purposes. These additional purposes were as follows:

    A. To conceal from the general public the unlawful management and insolvency of an industrial loan and investment company owned by many of the conspirators and their corporate employers;

    B. To mislead the general public to believe that the industrial loan and investment industry in Nebraska continued to be economically sound and well-managed; and

    C. To convert NDIGC money for the use and benefit of the conspirators and their corporate employers.

    In pursuit of the purposes of the conspiracy, the Defendants named in paragraphs 30, 32, 33 and 34 above, undertook the acts, omissions, and representations described in paragraph 17 above.

36. Before December 22, 1982, Beckman knowingly became a member of the conspiracy described in paragraphs 30, 31, 32, 33 and 35 above, by willingly becoming a member of the NDIGC Board and by

participating in acts and omissions of the NDIGC Board. About December 22, 1982, this conspiracy was enlarged to incorporate an additional unlawful purpose. This additional purpose was to use NDIGC deposit guaranty funds contrary to the provisions of the NDIGC Act. In pursuit of the purposes of the conspiracy, Amen, Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, and Spoeneman undertook the acts, omissions, and representations described in paragraph 18 above.

37. Before April 10, 1983, First National Omaha and O'Neal knowingly became members of the conspiracy described in paragraphs 30, 31, 32, 34, 35 and 36 above, by participating in the acts and omissions described in paragraph 19 above. About April 10, 1983, this conspiracy was enlarged to incorporate additional unlawful purposes. These additional purposes were as follows:

A. To convert NDIGC funds for the use and benefit of an institution not a member of NDIGC, and for the use and benefit of individual persons;

B. To conceal felonious acts of S.E. Copple, Newton Copple, and James Gillette; and

C. To conceal Amen's misfeasance and nonfeasance in office.

In pursuit of the purposes of the conspiracy Amen, Moylan, Adams, Applebee, Ashcraft, Beckman, Hake, Roemmich, Spoeneman, Lake, O'Neal, and First National Omaha undertook the acts, omissions, and representations described in paragraph 19 above.

38. Before November 1, 1983, Heumann knowingly became a member of the conspiracy described in paragraphs 30, 31, 32, 34, 35, 36, and 37 above, by

willingly becoming a member of the NDIGC Board and by participating in acts and omissions of the NDIGC Board. Heumann thereafter continued with other NDIGC directors to maintain the previously made misrepresentations described in paragraphs 12, 14, and 16 above.

39. As a proximate consequence of the acts, omissions, and representations described in paragraphs 12 through 19 and 30 through 38 above, Plaintiffs suffered damage in the manner described in paragraphs 20 and 21 above.

IV. FOURTH CAUSE OF ACTION: BREACH OF FAITH

40. Plaintiffs incorporate in this Fourth Cause of Action the allegations of paragraphs 1 through 21, and 30 through 38 above.

41. Amen, Moylan, and the NDIGC directors established and controlled the policies, acts, and omissions of NDIGC from January 6, 1979 through November 1, 1983.

42. From August 8, 1979 until after November 1, 1983, NDIGC was a surety as to accounts of Commonwealth depositors and an insurer of the integrity of Commonwealth management and the solvency of Commonwealth.

43. On August 8, 1979, NDIGC entered into the following contract with Commonwealth:

A. NDIGC offered to guaranty Commonwealth deposits by allowing Commonwealth to become a NDIGC member;

B. Commonwealth accepted NDIGC's offer, by becoming an NDIGC member;

C. From August 8, 1979 until after November 1, 1983, Commonwealth paid to NDIGC all amounts required by NDIGC as consideration for membership in NDIGC and for NDIGC deposit guaranties of Commonwealth depositor accounts.

44. With respect to the contract described in paragraph 43 above, Commonwealth and NDIGC were in an inherently unequal bargaining position in that the terms of the contract were set by NDIGC and were not subject to negotiation. Commonwealth was motivated to accept the terms of the contract set by NDIGC to provide security for its solvency and to provide future protection to Commonwealth depositors.

45. With respect to the contract described in paragraph 43 above, depositors of Commonwealth were third-party beneficiaries who are entitled to enforce the terms of the contract. Weimer and ACC assignors were especially vulnerable to harm flowing from non-performance of the contract and of necessity placed trust in NDIGC to perform the contract. NDIGC was bound to know that Weimer and ACC assignors were especially vulnerable to harm from non-performance of the contract.

46. Commonwealth was induced to enter into the contract described in paragraph 43 above, by the fraudulent misrepresentations and concealment of material facts, by Amen, Moylan, and the NDIGC directors in the manner described in paragraphs 12 through 19, and 30 through 38 above. Weimer and ACC assignors were induced to become and remain third party beneficiaries of this contract by these same fraudulent misrepresentations and concealment of material facts.

47. Amen, Moylan, and the NDIGC directors in dealing with Commonwealth for the benefit of Commonwealth depositors had the following duties:

    A. To cause NDIGC to perform the contract in good faith;

    B. To avoid self-dealing for their own benefit with NDIGC funds and contracts; and

    C. To avoid using NDIGC funds and contracts for the benefit of their corporate employers other than NDIGC.

48. The acts, omissions, and representations of Amen and NDIGC directors described in paragraphs 12 through 19 and 30 through 38 above, were in breach of their duties described in paragraph 47 above. As a proximate consequence of these breaches of duties, Plaintiffs were damaged in the manner described in paragraphs 20 and 21 above.

V. FIFTH CAUSE OF ACTION: BREACH OF FIDUCIARY DUTIES

49. The Plaintiffs incorporate in this Fifth Cause of Action the allegations of paragraphs 1 through 21 and 30 through 38 above.

50. In accordance with Section 21-17,135, R.R.S. Neb. 1943, the NDIGC Directors were given custody and control of payments by NDIGC member institutions to the NDIGC deposit guaranty fund. These payments were made to NDIGC for the benefit of depositors in member institutions, including Weimer and ACC assignors. The NDIGC Directors were therefore trustees of the NDIGC deposit guaranty fund, for the benefit of NDIGC member institution depositors.

51. The acts, omissions, and representations described in paragraphs 12 through 19 above, were in breach of the fiduciary duties of the Defendant NDIGC Directors as trustees of the NDIGC deposit guaranty fund.

52. Amen, Moylan, Lake, Short, O'Neal, Omaha National, and First National Omaha are liable to the Plaintiffs as principals, in the same manner as the Defendant NDIGC Directors/Trustees. This is because Amen, Moylan, Lake, Short, O'Neal, Omaha National, and First National Omaha instigated, promoted, encouraged, countenanced, and abetted the acts, omissions, and representations described in paragraphs 12 through 19 above.

53. As a proximate consequence of the acts, omissions, and representations described in paragraphs 12 through 19 above, Weimer and the ACC assignors were damaged in the manner described in paragraphs 20 and 21 above.

VI. SIXTH CAUSE OF ACTION: BREACH OF STATUTORY DUTIES AND THE DUTY OF FAITHFUL PERFORMANCE

54. The Plaintiffs incorporate in this Sixth Cause of Action the allegations of paragraphs 1 through 21 above.

55. Amen and Lake, as employees of the State of Nebraska, had positive duties to Weimer and ACC assignors as follows:

A. Under Sections 8-102 and 8-401.01, R.R.S. Neb. 1943, to supervise, control, and regulate Nebraska industrial loan and investment companies (industrials);

B. Under Section 8-401.02, R.R.S. Neb. 1943, to examine Nebraska industrials, to examine witnesses under oath, and to investigate and uncover violations of law by industrial officers;

C. Under Section 8-403.04, R.R.S. Neb. 1943, to revoke the licenses of executive officers of industrials, for mismanagement, self-dealing, and law violations;

D. Under Section 8-403.05, R.R.S. Neb. 1943, to require industrials and credit unions to provide surety bonds. The surety bonds were to indemnify each credit union and industrial against all loss of money caused by dishonest acts of officers or employees;

E. Under Section 8-408.02, R.R.S. Neb. 1943, to obtain complete knowledge of the condition of each industrial;

F. Under Section 8-416, R.R.S. Neb. 1943, to take over the property and business of insolvent industrials and to order liquidation of insolvent industrials.

56. Amen and Lake breached the duties described in paragraph 55 above, willfully, wantonly, and recklessly, as follows:

A. They failed and refused to supervise, control, and regulate Commonwealth, Dwight Co-Op, American Savings, The Industrial Company, and First Security Savings in the manner required by Nebraska statutes;

B. They failed and refused to investigate and uncover in a timely and diligent manner violations of law by officers of Commonwealth, The Industrial Company, American

Savings, and First Security Savings in the manner required by Nebraska statutes;

C. They failed to revoke the licenses of officers of Commonwealth. The Industrial Company, Dwight Co-Op, American Savings, and First Security Savings in a timely and diligent manner;

D. They failed to require surety bonds indemnifying against all losses incurred by Commonwealth, The Industrial Company, Dwight Co-Op, American Savings, and First Security Savings due to dishonesty of their officers and employees;

E. They failed and refused to obtain complete knowledge of the condition of Commonwealth, The Industrial Company, American Savings, and First Security Savings in a timely and diligent manner;

F. They failed and refused to declare the insolvency of Commonwealth, The Industrial Company, American Savings, and First Security Savings, and to take control of the business and property of these institutions.

57. In the manner described in paragraphs 12 through 19 and 30 through 38 above, Moylan, the Defendant NDIGC Directors and Short, O'Neal, Omaha National, and First National Omaha instigated, promoted, encouraged, countenanced, and abetted the breaches of duty described in paragraphs 55 and 56 above.

58. Under Section 8-102, R.R.S. Neb. 1943, Nebraska industrials are quasi-public in nature. The defendant State employees, NDIGC Directors, and officers of Nebraska industrials therefore had a duty to perform diligently and faithfully the responsibilities of

their respective offices. The acts, omissions, and representations described in paragraphs 12 through 19, and 30 through 38, 55 and 56 above, were breaches of this duty.

59. The Defendant NDIGC Directors and Moylan had positive duties to Weimer and ACC assignors as follows:

A. Under Section 21-17,139(1), R.R.S. Neb. 1943, to notify the Department of Banking and Finance of any information they had indicating the insolvent or unsound financial condition of member institutions;

B. Under Section 21-17,139(2), R.R.S. Neb. 1943, to examine or cause the examination of member institutions in an unsound financial condition;

C. Under Section 21-17,134(8), R.R.S. Neb. 1943, to ask the Department of Banking and Finance or a Court to take control of the affairs and property of member institutions in unsound financial condition;

D. Under Sections 21-17,128(1) and 21-17,144, R.R.S. Neb. 1943, to establish amounts of deposit guaranties fairly reflecting the ability of NDIGC to make good on the guaranties;

E. Under Section 21-17,135(3), R.R.S. Neb. 1943, to secure and hold membership and growth fees from member institutions as a fund for the payment of deposit guaranties;

F. Under Section 21-17,134, R.R.S. Neb. 1943, to consider the economic advisability of guaranteeing accounts of membership

applicants, without undue risk to NDIGC and to member institution depositors;

G. Under Section 21-17,135(4), R.R.S. Neb. 1943, to facilitate special assessments of member institutions for the benefit of member institution depositors.

60. The Defendant NDIGC Directors and Moylan breached the duties described in paragraph 59 above, willfully, wantonly, and recklessly, as follows:

A. They failed and refused to notify the Department of Banking and Finance of information they had indicating the unsound financial condition of member institutions Commonwealth, American Savings, and Dwight Co-Op;

B. They failed and refused to examine or cause to be examined member institutions Commonwealth, American Savings, and First Security Savings;

C. They failed and refused to ask the Department of Banking and Finance or a court to direct the takeover of the property and affairs of Commonwealth, American Savings, and First Security Savings;

D. They established and maintained NDIGC deposit guaranties in amounts which misrepresented the ability of NDIGC to make good on the guaranties as described in paragraphs 12, 16, 30, and 32 above;

E. They invaded and diminished the NDIGC deposit guaranty fund for purposes not authorized by law, in the manner described

in paragraphs 17, 18, 19, 33, 36, and 37 above;

F. They failed and refused to consider the economic advisability of admitting to membership Commonwealth and American Savings as described in paragraphs 14 through 31 above;

G. They failed and refused to present to NDIGC members the fact of impairment of NDIGC capital assets and to facilitate special assessments to secure NDIGC capital assets.

61. In the manner described in paragraphs 12 through 19 and 30 through 38 above, Amen, Lake, Short, O'Neal, Omaha National, and First National Omaha instigated, promoted, encouraged, countenanced, and abetted the breaches of duty described in paragraphs 59 and 60 above.

62. As a proximate consequence of the breaches of duty described in this sixth cause of action, the Plaintiffs were damaged in the manner described in paragraphs 20 and 21 above.

VII. SEVENTH CAUSE OF ACTION: DEPRIVATION OF CIVIL RIGHTS

63. The Plaintiffs incorporate in this Seventh Cause of Action the allegations of paragraphs 1 through 38 above.

64. The Defendants are persons or companies as defined in Section 49-801, R.R.S. Neb. 1943.

65. By the acts, omissions, and representations described in paragraphs 1 through 39 above, the

Defendants subjected Commonwealth creditors to the deprivation of rights and privileges as follows:

A. The right to honest, effective, faithful performance by Amen and Lake of their duties as officers and employees of the State of Nebraska;

B. The right to honest, effective, and faithful administration of the NDIGC by its directors and Moylan in accordance with the NDIGC Act;

C. The right not to have their property taken or damaged for public use without just compensation;

D. The right not to have their property taken or damaged without due process of law;

E. The right to equal protection of the law of the State of Nebraska.

66. The rights and privileges described in paragraph 65 above, are secured to Commonwealth creditors by the Fifth and Fourteenth Amendments to the Constitution of the United States of America; by Sections 1, 3, 6, 13, 21, and 25 of Article I of the Constitution of the State of Nebraska; and by the provisions of Sections 25-101 and 25-103, R.R.S. Neb. 1943.

67. By reason of the deprivations of rights and privileges described in paragraphs 65 and 66 above, the Defendants are liable to Commonwealth creditors including Weimer and the ACC assignors in accordance with the provisions of Section 20-148, R.R.S. Neb. 1943.

PRAYER FOR RELIEF

The Plaintiffs request judgment against the Defendants jointly and severally as follows:

A. On each of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action for actual, special, and consequential damages of $58,000,000.00; for costs of this action; for interest from the date of judgment; and for reasonable attorneys' fees;

B. On all causes of action, for judgment declaring the Defendants to be trustees for the benefit of the plaintiffs with respect to all money or other property, including accumulations of money or other property, received by the Defendants as a consequence of unlawful acts, omissions, and representations described in the Petition.

C. On all causes of action, for judgment requiring the Defendants to account to the Plaintiffs for the money and property described in paragraph B immediately above.

CLAUDE T. WEIMER and
ASSOCIATION OF COMMONWEALTH CLAIMANTS,

Plaintiffs.

BY: Robert R. Gibson
ROBERT R. GIBSON, Bar No. 11491
PROFESSIONAL LEGAL ASSOCIATES OF NEBRASKA, p.c.
740 South 17th Street
Lincoln, NE 68508
402-474-1440

CERTIFICATE OF SERVICE

Copies of this Amended Petition were mailed to attorneys on the attached list, on February 19, 1988.

/s/ Robert R. Gibson.
Robert R. Gibson

EXHIBIT A

THE DEFENDANTS:

Paul Amen
Kenneth A. Wellman
William C. Beckman
Douglas G. Alford
Alfred H. Adams
Kenlon H. Hake
Roy L. Ashcraft
Darrell D. Anderson
Timothy R. Spoeneman
Denis K. Applebee
Herbert R. Heumann
Allan C. Roemmick
Dennis O'Neal
Robert Short
Barry Lake
James Moylan

Commerce Savings Columbus, Inc.
Commerce Savings Lincoln, Inc.
Commerce Savings Scottsbluff, Inc.
Commerce Group, Inc.
First National Bank of Grand Island, Inc.
Provident Federal Savings Bank, Inc.
Union Bank & Trust Co., Inc.
American Security Bank, Inc.
Omaha National Bank & Trust Co., Inc.
First National Bank of Omaha, Inc.

Exhibit 1990-B

OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

Claude T. Weimer and Association of Commonwealth Claimants, an unincorporated association, Appellants and Cross-Appellees,
v.
Paul Amen et al., Appellees, Commerce Group, Inc., et al., Appellees and Cross-Appellants.

Case Caption

Weimer v. Amen

Filed May 11, 1990. Nos. 88-430, 88-652.

Appeal from the District Court for Lancaster County: Robert R. Camp, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellants.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellees Amen and Lake.

Gary L. Dolan, Trev. E. Peterson, and Shirley K. Poland-Williams, of Knudsen, Berkheimer, Richardson & Endacot; James B. Cavanagh, of Erickson & Sederstrom, P.C.; John M. Guthery and Gregory H. Perry, of Perry, Guthery, Haase, & Gessford, P.C.; Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Cline, Williams, Wright, Johnson & Oldfather; Faegre & Benson; and Crosby, Guenzel, Davis, Kessner & Kuester for appellees Commerce Group et al.

1. Statutes: Appeal and Error. Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

2. Statutes: Presumptions: Legislature: Intent: Appeal and Error. The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result.

3. Banks and Banking: Receivers: Debtors and Creditors. Neb. Rev. Stat. § 8-199 (Reissue 1983) grants the receiver broad authority to enforce all debts or other obligations of whatever kind of nature due to the creditors of the failed institution which arise by virtue of the institution's insolvency.

4. Banks and Banking: Receivers: Claims. In the absence of an allegation of an individual harm upon which a claimant can directly bring suit, claims are derivative and are properly pursued by the receiver under Neb. Rev. Stat. § 8-199 (Reissue 1983).

5. Constitutional Law: Statutes. No vested rights are impaired by a statutory or constitutional provision which creates a remedy for an existing right.

6. Constitutional Law: Due Process: Banks and Banking: Receivers. Neb. Rev. Stat. § 8-199 (Reissue 1983) does not unconstitutionally deny access to the courts, violate due process, nor take property for a public purpose without just compensation.

7. Summary Judgment. Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.

8. Summary Judgment: Appeal and Error. In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

9. Demurrer: Pleadings: Appeal and Error. In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which may be deduced from such facts, but does not accept conclusions of the pleader.

10. Demurrer: Pleadings. In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.

11. Actions: Banks and Banking: Receivers. A depositor may bring a derivative action to recover for wrongs

against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit.

12. Courts: Judgments: Appeal and Error. Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm.

Boslaugh, White, Shanahan, Grant, and Fahrnbruch, JJ., and Ronin and Colwell, D. JJ., Retired.

PER CURIAM.

Claude T. Weimer, for himself, and the Association of commonwealth Claimants, an unincorporated association, as assignees of various depositors of the Commonwealth Savings Company, brought an action against the defendants, alleging numerous improprieties in the management and supervision of the Commonwealth Savings Company, resulting in its subsequent insolvency, collapse, and liquidation. The defendants are Paul Amen, former director of the Department of Banking and Finance of the State of Nebraska; Barry Lake, former Department of Banking and Finance general counsel; various financial institutions, including members of the Nebraska Depository Institution Guaranty Corporation (NDIGC); and certain employees of the financial institutions, including the directors of the NDIGC.

Amen and Lake filed a motion for summary judgment, alleging that the causes of action against them were released by the settlement of a tort claim by the receiver

of the Commonwealth Savings Company, said settlement being approved by order of the district court for Lancaster County, funded by the Legislature, and paid by the State Treasurer to the receiver. The district court sustained the motion and dismissed the petition as to Amen and Lake.

The remaining defendants filed demurrers to the amended petition, claiming, among other things, that plaintiffs were not the real party in interest and therefore lacked standing to bring suit. The district court sustained the demurrers on this basis and dismissed the petition, as it contained an incurable defect.

The plaintiffs appealed from the order granting summary judgment (case No. 88-430) and from the judgment sustaining the defendants' demurrers and dismissing the plaintiffs' petition (case No. 88-652). As both appeals are from a single district court case and present essentially the same issues, we will consider and dispose of both appeals in a single opinion.

A review of the receivership proceedings in the matter of the insolvency of Commonwealth Savings Company is set forth here in order to explain how the case at bar arrived at the present juncture.

The Commonwealth Savings Company (hereafter Commonwealth) was an industrial loan and investment company in Lincoln, Nebraska. On November 1, 1983, the Department of Banking and Finance (hereafter the department) took possession of Commonwealth pursuant to Neb. Rev. Stat. §§ 8-416 (Reissue 1987) and 8-187 (Reissue 1983). On November 8, 1983, the district court for

Lancaster County issued an order declaring Commonwealth insolvent and appointed the department as the receiver and liquidating agent of Commonwealth according to § 8-416 and Neb. Rev. Stat. § 8-198 (Reissue 1983).

The receiver proceeded to file with the State Claims Board two tort claims against the State of Nebraska pursuant to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et. seq. (Reissues 1981 & 1987 & Supp. 1983). The first claim was filed on December 23, 1983, on behalf of the creditors of Commonwealth against the State, its officers, and employees for $56 million. The creditors alleged that negligent, willful, wanton, and fraudulent acts of the officers and employees caused the creditors' losses.

The second claim, filed on January 10, 1984, for $56,433,959.29, was brought on behalf of "a special class of creditors – those certificate of indebtedness holders who have a unique and special claim under the Nebraska Depository Institution Guaranty Corporation Act, Sections 21-17,127 through 21-17,145 R.R.S. Nebr. 1943 (Reissue 1977)." This claim essentially stated the same allegations against the same persons as in the first claim, and made further allegations attacking the constitutionality of Neb. Rev. Stat. § 21-17,141 (Reissue 1987).

The State Claims Board heard these claims on February 13, 1984, and on February 29 adopted a "decision" as to the claims. The decision enunciated that "the Board has decided that there is a strong possibility of some liability on the part of the State of Nebraska arising out of certain actions of the Banking Department with regard to

the Nebraska Depository Institution Guaranty Corporation Act." Based on its deliberations, the board decided that, pursuant to its statutory authority in § 81-8,211 (Reissue 1987), the State should compromise and settle the claims.

It is also provided in § 81-8,211 that any claim settled in an amount of more than $5,000 shall be submitted for approval by the district court for Lancaster County. The claims were thus submitted, and on March 2, 1984, a journal entry was filed by the district court's presiding judge ordering that a three-judge panel decide the matter due to the complexity of the legal issues presented, the public interest in the matter, and the need for a prompt decision by the court. On March 5, one of the judges was excused from service in the case, and the matter proceeded before a two-judge panel.

A hearing was held on March 12, where evidence was adduced and briefs were submitted to the court on the matter of approval of the State Claims Board's proposal of settlement.

On March 16, the district court denied the petition and application seeking approval of the State Claims Board's "decision" of February 29. In its 30-page order, the court determined that it was required to exercise its discretion and was not merely a "rubber stamp" with respect to action of the board, basing this determination on case law and the following portion of § 81-8,211; "The court may deny the application for any legal and sufficient reason, or may direct the State Claims Board to conduct further hearings on any material issues."

The Court found that the decision of the State Claims Board

> (1) Is not a compromise, settlement or allowance of a claim and therefore such action is in excess of the Board's authority.
>
> (2) Is unsupported by competent, material and substantial evidence in view of the entire record.
>
> (3) Is based on conclusion of law which are clearly erroneous and unsupported by any evidence in the record to the contrary.
>
> (4) Is arbitrary and capricious.

The court clearly went to great lengths in striving to discharge its duty of making a *legal* determination of whether the board's decision should be approved, as seen in part of the dicta in the court's order:

> Were it within our power to base our approval on moral grounds or on concepts of fundamental fairness, we would not hesitate to do so. However, our decision, as the structure of society as a whole, must rest upon the rule of law. . . . Almost all applicable law is clearly contrary to the position taken by the Receiver. The statutes are clear.
>
> . . . Frankly, we do not and cannot expect the majority of these people [who suffered grievous losses] to understand or appreciate the decision we must make which may appear to be based on legal technicalities. However, we are not free to depart from the law as clearly set forth in applicable statutes and judicial decisions.

Upon the receiver's motion, the matter was remanded to the State Claims Board. On April 2, the receiver filed a miscellaneous (contract) claim with the board. The contract claim essentially alleged that the NDIGC was an agency or instrumentality of the State, and therefore the State should be obligated to pay up to $30,000 on each of the guaranteed accounts at Commonwealth.

On June 12, 1984, the State Claims Board filed an amended petition and application in the district court for Lancaster County. The amended petition stated that on May 25, 1984, the State Claims Board held a further hearing pursuant to duly publicized notice with regard to the receiver's tort and contract claims. The amended petition further stated that the State Claims Board unanimously adopted both a decision and an "Agreement for Compromise of Tort Claim" at a duly publicized open meeting on May 31. This second decision by the board declared that, after considering both claims but without deciding the contract claim, a compromise settlement should be executed in the amount of $33 million. The amended petition and application therefore sought approval of the settlement in the district court, as required by § 81-8,211.

After a hearing on the matter on July 10, 1984, the district court issued a 46-page order on July 27 which denied approval of the board's "decision" of May 31 for the following reasons:

> a. Our conclusions as to the law applicable to this matter are substantially the same as expressed in our prior Order. The law, particularly in light of the decision in *Varig Airlines*

[467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)], is not supportive of the Receiver's position. Therefore, the Receiver's probabilities of success should the claim be litigated are not encouraging.

b. There has been an inadequate showing as to the amount of damages which reasonably may be incurred, particularly in regard to the valuation of the remaining assets of Commonwealth.

c. This proposed settlement, like the prior decision, virtually provides for reimbursement of one hundred percent of the possible loss when the liquidating value of the assets is included. Based on the likelihood of success should the claim be litigated, the Decision of the Board clearly is excessive and is not a fair and reasonable settlement when confronted with the minimal likelihood of liability.

d. The Decision of the Board is based on conclusions of law which are clearly erroneous.

Pursuant to stipulation of the parties filed on October 30, the district court remanded the matter to the State Claims Board for the sole purpose of allowing the receiver to withdraw the claim, pursuant to § 81-8,213 (Reissue 1987), and to file suit on the claim.

The record further shows that the receiver proceeded to file suit against the State of Nebraska on March 20, 1985, in the district court for Lancaster County. The receiver alleged numerous (33) acts of wrongful and negligent conduct by the department in failing to supervise, regulate, and examine Commonwealth, including wrongful and negligent conduct of the department's director in

admitting Commonwealth as a member of the NDIGC. The State's answer generally denied all allegations in the receiver's petition.

On March 29 the parties to the action filed an application for approval of settlement pursuant to § 81-8,218 (Reissue 1987), requesting the court's approval of a compromise settlement of all claims of the plaintiff, holders of all certificates of indebtedness of plaintiff, and all other creditors of plaintiff. Conditions of the settlement included the payment to the receiver of the sum of $8.5 million as a full and complete compromise settlement of any and all claims of the receiver (on behalf of itself and its representatives) against the State, the department, and their past, present, and future officials and employees. A release of all claims by the receiver to be executed upon payment of the $8.5 million accompanied the application.

As the settlement affected the initial district court receivership proceedings wherein Commonwealth was first declared insolvent, the receiver also filed therein, on April 1, 1985, an application requesting that the district court set a hearing date for the application for authority to settle in the receiver's suit against the State and to authorize notice of the hearing to Commonwealth creditors by sending a notice to each creditor by mail, and by publication in a newspaper of general circulation for three consecutive weeks prior to the hearing.

The district court entered orders dated April 1 in each of the aforementioned cases, setting the hearing for April 22 and approving the form and method of notice to the creditors. On April 15, the presiding judge of the

district court for Lancaster County appointed a two-judge panel to consider the matter.

After the hearing, the court entered an order on April 26 that the application for approval of settlement be approved and forwarded to the Legislature for review and the appropriation of funds. In its order, the court found that proper notice had been given to the creditors pursuant to law and the order of the court. The court noted that the substantial majority of creditors who expressed an opinion at or before the hearing were either opposed to the proposed settlement or had reservations concerning the terms of the release or the future actions of the Legislature. The court stated, however, that it could not modify the proposed amount of the settlement or any of its provisions. The court had only the authority to approve or disapprove.

The court said that in reviewing the proposed settlement it adhered to its statement in the prior orders denying the State Claims Board's proposed settlement: " 'Therefore, this court, in exercising its discretion herein must reach a conclusion as to the likelihood of liability on the part of the State, the amount of damages resulting from such liability and whether any proposed settlement is fair, adequate and reasonable to both the claimants and the State.' "

Thus reviewing the matter, the court concluded that the proposed settlement was fair, adequate, and reasonable to both the claimants and the State, and could find no legal or other reason to disapprove it. The court also entered an abbreviated order approving the settlement in the initial Commonwealth matter of insolvency.

The record shows that a state treasury warrant was issued to the receiver in the amount of $8,518,228.09 and that the release was signed on September 26, 1985, by the receiver.

INTERPRETATION OF § 8-199

Appellants assign error to the district court in its interpretation of Neb. Rev. Stat. § 8-199 (Reissue 1983). Statutory interpretation is a matter of law in connection with which this court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). The general rules governing statutory construction and interpretation provide that in the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Furthermore, it is not within the province of this court to read a meaning into a statute which is not warranted by the legislative language; neither is it within the province of this court to read anything plain, direct, and unambiguous out of the statute. In construing a statute it is presumed that the Legislature intended a sensible, rather than an absurd, result. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W. 2d 151 (1989).

We find that the plain, direct, and unambiguous language of § 8-199 allows the receiver to enforce "all debts or other obligations of whatever kind or nature due" to the creditors of the failed institution, including those

asserted by the appellants. This construction is consistent with the rule of a corporate receiver:

> A corporate receiver represents not only the corporation, but all its creditors, and as to the latter it is his duty to secure all the assets available for their payment. For this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone.

66 Am. Jur. 2d *Receivers* § 450 (1973).

Appellants contend that they alone can enforce their alleged causes of action, and cite as a proposition of law that the receiver of an insolvent institution may not take possession of property that did not belong to the insolvent institution. Appellants cite *Frederick V. McRae,* 157 Minn. 366, 196 N.W. 270 (1923), in support of this proposition. That case holds that a depositor can have an individual right of action in deceit which could not be brought by the receiver if the bank officers fraudulently accepted deposits while knowing the bank was insolvent. Nebraska law has long recognized that a depositor may have an individual action under this scenario. See, *Higgins v. Hayden,* 53 Neb. 61, 73 N.W. 280 (1897); *Wilson v. Coburn,* 35 Neb. 530, 53 N.W. 466 (1892). However, appellants do not sufficiently state such a cause of action.

We believe that appellants' alleged actions are properly characterized in *In re Sunrise Securities Litigation,* 108 Bankr. 471, 476 (E.D. Pa. 1989):

> In general, "wrongs committed by a bank's officers or directors that injure all depositors and creditors alike create a liability which is an asset of the bank itself and for which only the bank or its receiver may recover." *In re Longhorn Securities Litigation,* (*573 F.Supp. 255*) 272 (W.D. Okla.1983), *citing Adato v. Kagan,* (*559 F.2d 1111*) 1117) (2d Cir.1979). Under such circumstances, "[t]he damage to depositors is indirect only and it is generally recognized that for such matters a depositor has no direct and individual right of action against a director." *Michelsen v. Penney,* (*20 F.Supp. 537, 539*) (S.D.N.Y.1934) *See* 11 Michie, *Banks and Banking,* Ch. 3, § 69, at 479 (1986) ("where the amount for which the officers and directors may be liable results from matters affecting all creditors, they constitute assets of the corporation for the benefit of all depositors and creditors, and suit therefor must be brought by the bank or its receiver"). . . .

In re Sunrise Securities Litigation further holds that when a depositor claims to have been defrauded by a misrepresentation or omission in a statement directed to the general public, he or she does not allege a wrong that is distinctly the depositor's and not common to other depositors or creditors, and therefore claims an indirect injury.

Appellants' petition alleges that misrepresentations were made to the general public, not to a single depositor or specific group of depositors. Further, appellants allege that the appellees' willful and negligent actions harmed all depositors and, in at least one instance, harmed Commonwealth *creditors*. The petition is not even clear

whether the Association of Commonwealth Claimants represents all Commonwealth depositors.

Other cases cited by appellants, including *State ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933), *Brownell v. Adams*, 121 Neb. 304, 236 N.W. 750 (1931), and *Rogers v. Selleck*, 117 Neb. 569, 221 N.W. 702 (1928), affirm the acts of the respective receivers in enforcing causes of action on behalf of creditors and are not supportive of appellants' contention that they distinctly own their alleged causes of action.

We therefore find that the appellants have not alleged an individual harm, but that their claims are derivative and clearly are properly pursued by the receiver under § 8-199.

The appellants also challenge the constitutionality of § 8-199, alleging that it denies access to the courts, deprives appellants of due process, and takes property of citizens for a public purpose without just compensation. In *Department of Banking v. Hedges*, 136 Neb. 382, 286 N.W. 277 (1939), this court upheld the constitutionality of a receivership procedure under predecessor statutes which allowed the Department of Banking and its superintendent to bring actions on behalf of creditors. Therein we stated:

> In 9 C.J.S. 170, sec. 88, it is said:
>
> "However, unless the Constitution specifically prescribes and limits the persons by whom such actions may be brought, it is within the power of the legislature to authorize particular persons to sue, and statutes conferring such authority have been sustained. Further, since

> such legislation is procedural, and since methods of procedure which do not affect the substantial rights of the parties are within the control of the legislature where no new right is created nor any penalty imposed, a statutory change as to the person who may enforce the liability may apply to stockholders who became such before its enactment as well as to those who became such thereafter. . . . "
>
> . . . .
>
> In *Luikart v. Bunz*, [125 Neb. 867, 252 N.W. 473 (1934)], the effect of the decision is: " . . . No vested rights are impaired by statutory or constitutional provision which creates a remedy for an existing right."

Hedges, supra at 393-94, 286 N.W. at 284.

We have also more recently held that, in record to obtaining a remedy through the courts, article 1, § 13, of the Nebraska Constitution is not violated when one party brings an action on another's behalf. See, e.g., *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959) (guardian or next friend may sue on behalf of infants to recover damages done to their person or property by tortious acts of another). Likewise, we hold that § 8-199 merely imposes a procedural remedy which does not affect the substantial rights of the parties, and therefore does not unconstitutionally deny appellants access to the courts.

Regarding the due process challenge, both appellants and appellees cite *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L.Ed. 369 (1948). That case sets forth the following on due process:

> The primary purpose of that constitutional guaranty is security of the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice. 12 Am. Jur., Constitutional Law, § 575, p. 271.
>
> As related to legislation, it is generally held that due process is satisfied if the Legislature had the power to act on the subject matter, if that power was not exercised in an arbitrary, capricious, or unreasonably discriminatory manner, and if the act, being definite, had a reasonable relationship to a proper legislative purpose. In other words, if an act of the legislature is authorized and promulgated by the inherent and reserved constitutional powers of the state, and is enforced with due regard to and observance of the rules established by our system of jurisprudence for the security of life, liberty, and property, it is not in conflict with due process of law. 16 C.J.S., Constitutional Law, § 569, p. 1156.

Rein, supra at 82, 30 N.W.2d at 557-58.

As our previous discussion shows, the Legislature clearly had the power to enact § 8-199 as a procedural remedy. Further, the statute has a reasonable relationship to the receiver's purpose of wrapping up the business of the insolvent institution and treating all creditors equitably and fairly. The statutory scheme of a receivership seeks to avoid preferences among creditors, to avoid a multiplicity of lawsuits and races to the courthouse, and to give the receiver meaningful authority to pursue claims, negotiate compromise settlements, and execute binding releases. Finally, in granting the receiver broad

authority to enforce claims on behalf of not only the failed institution but of shareholders and *all* creditors in order to accumulate all possible assets, the power of the Legislature was exercised in neither an arbitrary, capricious, nor unreasonably discriminatory manner. We therefore find that § 8-199 satisfies due process requirements.

Lastly, we find no merit in appellants' argument that § 8-199 allows an unconstitutional taking. We have determined that § 8-199 allows the receiver to enforce the appellants' causes of action. Simply stated, appellants' "property" is not being taken without compensation, but, rather, the enforcement of those rights is given to the receiver (pursuant to the Legislature's power to do so) in order to secure compensation for all creditors in an equitable and nonpreferential manner.

We therefore find no merit in appellants' constitutional challenges to § 8-199.

DEFENDANTS AMEN AND LAKE

There is no dispute that Amen and Lake, as department employees, were properly made defendants in the receiver's suit against the State and in the case at bar. The receiver's petition in its action against the State makes 33 separate allegations of "*wrongful* and negligent conduct of the Department, its Director and its employees," which necessarily encompass the appellants' causes of action against Amen and Lake. The appellants merely contend that they, and not the receiver, are the proper parties to bring their causes of action. Such contention, as we have stated, is without merit.

Appellants also assign error to the district court in accepting a release signed by the receiver as a bar to this action. The receiver's ability to settle or compromise any doubtful debts is enumerated in § 8-199 and Neb. Rev. Stat. §§ 8-1,103 and 8-1,104 (Reissue 1983). The receiver's ability to settle a doubtful debt has also been upheld by this court. See *State v. German Savings Bank*, 65 Neb. 416, 91 N.W. 414 (1902). After going through the State Claims Board and having a proposed settlement rejected twice, the receiver clearly saw this claim as a doubtful debt and therefore entered into a compromise settlement in its claim against the State. Further, the receiver is empowered, under § 8-199, to "make, execute, and deliver any and all . . . instruments necessary and proper to effectuate . . . the settlement of any obligations. . . . " The same power specifically stating "releases" is also granted in § 8-1,103. SECTION 81-8,223 (reissue 1987) provides that an award in a state tort claim shall constitute a complete release by the claimant of any claim against the State and against the employee of the State whose act or omission gave rise to the claim, by reason of the same subject matter. The receiver was therefore within its statutory authority in executing the release as a necessary and proper instrument to effectuate the settlement.

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *Peterson v. Don Peterson & Assoc. Ins. Agency*, 234 Neb. 651, 452 N.W.2d 517 (1990);

John v. OO (Infinity) S. Development Co., 234 Neb. 190, 450 N.W.2d 199 (1990). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Peterson, supra; John, supra.*

Viewing the evidence in a light most favorable to appellants, our conclusion remains that the receiver acted at all times within its statutory authority and that Amen and Lake, by virtue of the release, were entitled to summary judgment as a matter of law.

REMAINING DEFENDANTS

The district court sustained the remaining defendants' demurrers on the basis that the plaintiffs were not the real party in interest and therefore lacked the capacity to bring suit. See Neb. Rev. Stat. § 25-806 (Reissue 1989).

In reviewing an order sustaining a demurrer, this court accepts the truth of facts well pled and the factual and legal inferences which reasonably may be deduced from such facts, but does not accept conclusions of the pleader. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, ___ N.W.2d ___ (1990); *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989); *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989). In ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Meyerson, supra; S.I.D. No. 272, supra.*

We have determined that appellants' actions are derivative and that they have not suffered individual harm upon which they can sue directly. Their actions are properly brought by the receiver. However, the record shows that the receiver sued only the State of Nebraska, the department, and its employees. If the appellants in fact state a cause of action against the NDIGC or other defendants, this leaves Commonwealth, its creditors, and its depositors with a claim which the receiver failed or neglected to pursue.

The liability of the NDIGC and the State toward the depositors was alleged in the second claim brought before the State Claims Board by the receiver. This raises the question of whether the NDIGC is an agency of the State; for if it is, it would be free of liability by virtue of the release executed by the receiver. The State Tort Claims Act, § 81-8,210(1) (Reissue 1987), says that for the purposes of the act: "State agency shall include all departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska, but shall not include corporations that are essentially private corporations."

The Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat §§ 21-17,127 et. seq. (Reissue 1987), lists four purposes of the act in § 21-17,128. One of those purposes involves a duty of the department "[t]o assist in the detection and prevention of depository institution insolvencies or liquidations," while the other purposes relate solely to the objectives and operations of the corporation. In § 21-17,132 the act gives the corporation all powers granted to nonprofit corporations (which are

not state agencies) as provided in Neb. Rev. Stat. ch. 21, art. 19 (Reissue 1987). Sections 21-17,134 and 21-17,136 indicate that the department acts in a supervisory or regulatory role toward the NDIGC, just as it does with all chartered financial institutions – most of which are private corporations. The NDIGC is formed by private financial institutions, and the members of its board of directors must be officers of those institutions. See §§ 21-17,132 and 21-17,133. The corporation is operated neither by state employees nor at the direction of state government.

An examination of the legislative history of the act shows that the corporation was not intended to be an arm or instrumentality of the State. Testimony on 1976 Neb. Laws, L.B. 948 (the provisions of which would eventually become the NDIGC act), was presented at a hearing before the Banking Committee. James Moylan, a proponent of the bill, stated:

> I think if you want to take the Banking Department and then show the areas that it operates in, it will be banks, industrials, credit unions, savings and loans and right along beside it will be the guaranty corporation. And their relationship to it will be conducted pretty much by this act when you get over to the Banking Act, it's this way with banks; it's this way with credit unions; it's this way with savings and loans; so, it would be another institution that they would have.

Banking Committee Hearing, L.B. 948, 84th Leg., 2d Sess. 25 (Jan. 27, 1976).

Charles Aron of the department stated: "It is our understanding of the concept of this type of a corporation

to basically insure the deposits in the credit unions with this as a complement to the supervision done by the Department of Banking not in lieu of supervision." *Id.* at 29.

> Further, William Riley, director of the department, stated: [T]he Department is not looking to this type of legislation to make our job a [sic] regulation and supervision of both credit union and cooperatives easier for us. . . .
>
> . . . .
>
> . . . Well, I guess the feeling that I don't want to give this committee because I've demonstrated it to the credit unions, is that we are not using this as an arm for better supervision and regulation.

Id. at 31, 33.

Based on our reading of the act and its legislative history (in particular the foregoing statements), we conclude and find that the NDIGC is an "essentially private" corporation and is not an instrumentality or agency of the State of Nebraska. Consequently, appellants have stated a cause of action at least against the NDIGC based on statutory and common-law contractual liability toward Commonwealth and its depositors.

Although the receiver was the proper party to enforce that liability, the appellants are not left without a remedy in this situation. While § 8-199 gives the receiver broad authority to enforce claims on behalf of the bank, its shareholders, and creditors, we find that the shareholders and creditors must be afforded relief when the receiver fails or neglects to enforce a claim. Therefore, in

remaining consistent with general corporate law and the federal common law, we hold that a depositor may bring a derivative action to recover for wrongs against the bank or financial institution, which wrongs have indirectly injured depositors, but only after having made an unsuccessful demand on the bank or its receiver to bring suit. See, *In re Sunrise Securities Litigation*, 108 Bankr. 471 (E.D. Pa. 1989); *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3d Cir. 1973); *Michelsen v. Penney*, 10 F. Supp. 537 (S.D.N.Y. 1934).

In order for appellants to state a derivative action, their petition must allege the fact that a demand has been made on the receiver or that such a demand would be futile. The petition makes no such allegation, thereby failing to allege facts sufficient to constitute a cause of action. Consequently, we affirm the action of the trial court in sustaining the demurrers, but for the reason set forth above. See *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988) (where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the Supreme Court will affirm).

The defense of the statute of limitations is raised by way of cross-appeal or otherwise in the briefs of certain appellees. However, as the district court made no ruling on this issue, we decline to express an opinion on the matter at this time and leave to the trial court the propriety of this defense and any others that may arise after the appellants are given an opportunity to amend their petition.

The order in case No. 88-430 granting summary judgment to defendants Amen and Lake is affirmed. In case No. 88-652, we affirm the order of the trial court in sustaining the demurrers, but reverse that part of the trial court's order dismissing the petition and remand this cause with directions to allow the appellants to amend their petition.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.